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No. 06-

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

BILL LOCKYER, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the State of California's regulation of noncoercive employer speech about union organizing, California Assembly Bill 1889, Cal. Gov't Code §§ 16645.2, 16645.7, preempted by federal labor law?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties before this Court are petitioners the Chamber of Commerce of the United States of America; California Chamber of Commerce; Employers Group; California Hospital Association (*fka* California Healthcare Association); California Manufacturers and Technology Association; California Association of Health Facilities; Aging Services of California (*fka* California Association of Homes & Services for the Aging); Marksherm Corporation; Zilaco, Inc.; and Front Porch (*fka* Internext Group) ("petitioners"); and respondents Bill Lockyer, Attorney General, in his capacity as Attorney General of the State of California; California Department of Health Services; Frank G. Vanacore, as the Chief of the Audit Review and Analysis Section of the California Department of Health Services; Diana M. Bonta, R.N., Dr., Ph.D, as the Director of the California Department of Health Services; California Labor Federation, AFL-CIO; and American Federation of Labor and Congress of Industrial Organizations ("respondents"). The other parties in the Ninth Circuit were Bettec Corporation; Zilaco; Beverly Health & Rehabilitation Services, Inc. (*dba* Beverly Manor Costa Mesa); and Del Rio Sanitarium, Inc. (*fka* Del Rio Healthcare, Inc.).

None of the petitioners has a parent company or publicly held company owning 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The Chamber of Commerce of the United States of America, *et al.*, respectfully petition for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California was issued on September 16, 2002, and is reported at 225 F. Supp. 2d 1199 (Pet. App. 140a-149a).

The first panel opinion of the United States Court of Appeals for the Ninth Circuit was issued on April 20, 2004, and is reported at 364 F.3d 1154 (Pet. App. 114a-139a). The Ninth Circuit's order granting rehearing and withdrawing the first opinion was issued on May 13, 2005, and is reported at 408 F.3d 590 (Pet. App. 157a-158a). The second panel opinion of the Ninth Circuit was issued on September 6, 2005, and is reported at 422 F.3d 973 (Pet. App. 58a-113a). The Ninth Circuit's order granting rehearing *en banc* was issued on January 17, 2006, and is reported at 435 F.3d 999 (Pet. App. 155a-156a); its order withdrawing the second panel opinion was issued on February 9, 2006, and is reported at 437 F.3d 890 (Pet. App. 153a-154a). The *en banc* opinion of the Ninth Circuit was issued on September 21, 2006, and is reported at 463 F.3d 1076 (Pet. App.1a-57a). On November 20, 2006, the Ninth Circuit entered an order staying its mandate pending this Court's disposition of this case. Pet. App. 151a-152a.

JURISDICTION

The *en banc* opinion of the United States Court of Appeals for the Ninth Circuit was issued on September 21, 2006. Pet. App. 1a-57a. On December 7, 2006, petitioners timely filed an application to extend the time to file a petition for certiorari from December 20, 2006, to January 5, 2007. On December 12, 2006, Justice Kennedy granted the

application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are the Supremacy Clause of the United States Constitution, U.S. CONST., art. VI, cl. 2, section 8(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(c), and California Assembly Bill No. 1889 ("AB 1889"), Cal. Gov't Code §§ 16645-16649, each of which is set out in full in the Appendix to this Petition. Pet. App. 159a-167a.

STATEMENT

This is a preemption case arising under the NLRA. In response to union lobbying efforts, California enacted AB 1889 in 2000 to forbid employers receiving state funds of virtually every type, including state grant and program funds, from using those funds to "assist, promote, or deter union organizing." Petitioners—joined in the Ninth Circuit by *amicus* the National Labor Relations Board ("NLRB")—have argued that this California statute is preempted under the NLRA in part because it deters an activity, noncoercive employer speech about union organizing, that federal labor policy protects and encourages. In a divided *en banc* decision, the United States Court of Appeals for the Ninth Circuit sustained AB 1889.

A. The National Labor Relations Act

The NLRA, 29 U.S.C. §§ 151-169, was enacted in 1935 to federalize and bring uniformity to labor-management relations. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (the NLRA is designed "to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies") (internal quotation marks and citation omitted); *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 286 (1971) (the NLRA is "a comprehensive

national labor law . . . for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces"). Although the NLRA contains no express preemption provision, "[i]t is by now commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). In particular, this Court has held that the NLRA preempts state regulation of activity (i) that Congress intended to remain unregulated, *see Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976) ("*Machinists*"), and (ii) protected, prohibited, or arguably protected or prohibited by the NLRA, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*").

Employees have the right under the NLRA to "join" or "to refrain" from joining a union. 29 U.S.C. § 157. To become an exclusive collective bargaining representative, a union must be supported by a majority of employees in an appropriate bargaining unit. This is typically done through a secret-ballot election overseen by the NLRB. *Id.* § 159. Campaigns preceding these representation elections often are vigorously contested, with employees being inundated with union arguments for, and employer arguments against, unionization. *See generally Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 58 (1966).

When Congress amended the NLRA in 1947, it added section 8(c), which provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This Court has stated that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn*, 383 U.S. at 62.

B. California Assembly Bill 1889

AB 1889, signed into law by Governor Gray Davis in 2000, forbids employers that receive either a state "grant" or over $10,000 from a "state program" from using those funds "to assist, promote, or deter union organizing," Cal. Gov't Code §§ 16645.2, 16645.7, which is defined as "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . [or] [w]hether to become a member of any labor organization," *id.* § 16645(a).[1] This proscription applies to "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." *Id.* § 16646(a).

There are several exceptions to AB 1889's spending ban. Covered employers are free under AB 1889 to use "state funds" to enter into a "voluntary recognition agreement"

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[1] The preamble to AB 1889 states that "[i]t is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union" and that "[i]t is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization." Cal. Stats. 2000, Ch. 872, § 1. Although only the spending bans related to state grants and programs are currently before this Court, *see* Dist. Ct. Docket No. ("Dkt.") 168 (Ninth Circuit Supplemental Excerpts of Record ("SER") 758-770), AB 1889 also precludes reimbursements to employers for any union-related activity, Cal. Gov't Code § 16645.1(a); prohibits employers from speaking to employees working on state contracts about union organizing, *id.* § 16645.3(a); imposes a spending ban on employers with state contracts of over $50,000, *id.* § 16645.4(a); and bars employers from using certain state property to meet with employees about union organization, *id.* § 16645.5(a).

with a union, thereby allowing that union to bargain collectively on behalf of the employer's workforce without having to win a secret-ballot election. Cal. Gov't Code § 16647(d). In addition, AB 1889 does not apply to employer expenditures related to grievance handling; negotiating or administering a collective bargaining agreement; allowing a labor organization access to employer property; or performing an activity required by law or a collective bargaining agreement. *Id.* § 16647(a)-(c).

All employers must provide a certification that they will abide by AB 1889's spending prohibitions. Cal. Gov't Code §§ 16645.2(c), 16645.7(b). Employers that have sufficient private funds to speak about union-organizing attempts are subject to several additional regulatory requirements:

Segregated Accounting Systems. Employers must create separate accounts for funds traceable to a state grant or program and implement special accounting procedures to trace all expenditures related to union organizing. That is so because if employers make an expenditure relating to union organizing from an account with commingled funds, AB 1889 creates an irrebuttable presumption that "state funds" have been (illegally) used on a *pro rata* basis. Cal. Gov't Code § 16646(b).

Employee Salaries. Employers must ensure that employees who spend any portion of their work time on unionization matters are paid for such time with funds that cannot be traced to "state funds" in order to comply with AB 1889's prohibition with respect to employee salaries. Cal. Gov't Code § 16646(a).

Recordkeeping and Disclosure. Employers must maintain records "sufficient" to show that no "state funds" were used to assist, promote, or deter union organizing. Cal. Gov't Code §§ 16645.2(c), 16645.7(c), and employers must provide these records to the California Attorney General upon request, *id.* §§ 16645.2(c), 16645.7(c).

Employers may be sued under AB 1889 by the California Attorney General or "any state taxpayer," which could include a union involved in an ongoing effort to organize an employer's workforce. Cal. Gov't Code § 16645.8(a). In addition to injunctive and other equitable relief, a court may award treble damages—*i.e.*, disgorgement plus a civil penalty of twice that amount. *Id.* §§ 16645.2(d), 16645.7(d), 16645.8(a). Although any damages award goes to the state, a prevailing private plaintiff can recover attorney's fees and costs. *Id.* § 16645.8(d).

An example of a "state program" to which AB 1889 applies is Medi-Cal, California's Medicaid program. Dkt. 30 (SER 11-12). Medi-Cal provides health insurance for certain low-income and elderly persons, and reimbursements to employers that provide healthcare services for Medi-Cal insurees are therefore governed by AB 1889. Petitioner Zilaco, Inc., for example, receives over 90 percent of its revenue from Medi-Cal. Dkt. 43 (SER 69-72). Other employers in California, such as United Cerebral Palsy, are entirely dependent upon Medi-Cal for their earnings. Dkt.32 (SER 46-49); *see also* Dkt. 118 (SER 499-525) (identifying over 500 employers that rely exclusively on Medi-Cal reimbursements).

C. Proceedings in the District Court

Petitioners filed this action in 2002 in the United States District Court for the Central District of California arguing that AB 1889 is preempted by the NLRA and seeking declaratory and injunctive relief. Respondents California Department of Health Services and individual California officials were named in the complaint; respondents the California Labor Federation, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations intervened.

On cross-motions for summary judgment, the district court entered partial final judgment in favor of petitioners declaring sections 16645.2 and 16645.7 of the California

Government Code preempted under the *Machinists* doctrine because they "regulate[] employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. App. 147a.

D. Decisions of the Court of Appeals

The United States Court of Appeals for the Ninth Circuit issued three opinions in this case: two panel opinions holding that the contested provisions of AB 1889 were preempted by the NLRA, and an *en banc* opinion holding that they were not.

First panel opinion. The first Ninth Circuit opinion, authored by Judge Fisher, held that AB 1889 was preempted under *Machinists*. The court, explaining that "open and robust advocacy by both employers and employees must exist in order for the NLRA collective bargaining process to succeed," held AB 1889 preempted because it "directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process." Pet. App. 127a.

Second panel opinion. The Ninth Circuit panel granted rehearing and withdrew the first opinion. The second opinion, written by Judge Beezer, held that AB 1889 was preempted under *Machinists* and *Garmon*. It held that "by discouraging employers from exercising their protected speech rights," AB 1889 "operates to significantly empower labor unions as against employers" and "runs roughshod over the delicate balance between labor unions and employers as mandated by Congress through the [NLRA]." Pet. App. 81a. Judge Fisher, author of the first opinion, dissented from the second opinion and would have remanded to consider preemption of several of AB 1889's enforcement provisions, which he stated "appear to have an impermissibly intrusive effect on the NLRA's balance . . . between employer and employee." Pet. App. 110a.

En banc opinion. The Ninth Circuit granted rehearing *en banc* and withdrew its second opinion. Over the dissent of

three judges, the *en banc* court, in an opinion by Judge Fisher, held that AB 1889 was not preempted by the NLRA in any respect. The *en banc* court rejected respondents' argument that there could be no preemption because the State of California in AB 1889 was not acting as a regulator, but rather as a proprietor (or "market participant"). The court held that "California's condition on the use of its funds constitutes 'regulation[],'" Pet. App. 7a, because "[t]he statute's scope indicates a general state position of neutrality with regard to organizing, not a narrow attempt to achieve a specific procurement goal," Pet. App. 12a. It nonetheless determined that AB 1889 was not preempted under either *Machinists* or *Garmon*.

The *en banc* majority held that *Machinists* was inapplicable because AB 1889 involves the use of state funds, an activity which "by definition [is] not controlled by the free play of economic forces." Pet. App. 17a. It determined, in any event, that "an employer has and retains the freedom to spend its own funds however it wishes," and that AB 1889's effect on noncoercive employer speech is therefore "indirect and incidental." Pet. App. 17a & 18a n.10. It also noted that *Machinists* applies only to "activity left free from *all* regulation," and determined that the NLRB's "extensive regulation of organizing activities demonstrates that *organizing*—and employer speech in the context of organizing—is not such a zone." Pet. App. 19a (emphases in original).

Garmon did not apply, the Ninth Circuit *en banc* held, because noncoercive employer speech is neither actually nor arguably protected by the NLRA. It held that section 8(c) of the NLRA "does not *grant* employers speech rights" but "simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice." Pet. App. 23a (emphasis in original). It held that even were noncoercive employer speech protected under the NLRA, AB 1889, as an exercise of the state's spending power, falls within an exception to *Garmon* preemption for state regulation of

conduct that involves "'interests so deeply rooted in local feeling and responsibility that . . . we [cannot] infer that Congress ha[s] deprived the States of the power to act.'" Pet. App. 30a (quoting *Garmon*, 359 U.S. at 243; brackets in original). The *en banc* majority recognized that *Garmon*'s "deeply rooted" exception had never been applied to a state spending decision, but determined that a state "has a responsibility and a right to spend its treasure . . . based on principles and guidelines that its democratically elected legislature deems to be appropriate." Pet. App. 31a.

In so holding, the Ninth Circuit expressly rejected the views of the NLRB, which, as *amicus*, argued that AB 1889 is preempted under both *Machinists* and *Garmon*. The NLRB explained that "the federal policy, expressed in NLRA Section 8(c), [is] to insure both to employers and labor organizations full freedom to express their views to employees on labor matters." NLRB *Amicus* Brief at 6, *Chamber of Commerce v. Lockyer* (9th Cir. Nos. 03-55166, 03-55169) (internal quotation marks and citation omitted), *available at* 2003 WL 22330725. The NLRB argued that AB 1889 should be preempted because it "reflects California's labor-driven policy decision to use state spending power to pressure private employers to conform to the state model that conflicts with the federal model." *Id.* at 15.

Judge Beezer, joined by Judges Kleinfeld and Callahan, dissented. In addition to reiterating several of the arguments made in the second panel decision, the dissent cited an intervening decision from Seventh Circuit Court of Appeals, *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, 431 F.3d 277, 278-79 (7th Cir. 2005), for the proposition that "regulation that specifically targets and substantially affects the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds." Pet. App. 51a (Beezer, J., dissenting).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision—upholding California's spending restriction that was concededly designed for the regulatory purpose of deterring noncoercive employer speech concerning unionization—is based on two fundamentally erroneous preemption analyses. *First*, the Ninth Circuit incorrectly ruled that the NLRA's express authorization and protection of this noncoercive speech in section 8(c) does not foreclose direct state regulation and punishment of such speech. *Second*, the Ninth Circuit erred in ruling that, because the regulation here comes in the form of a spending restriction, it does not impose a cognizable burden on employers' noncoercive speech.

Both of these preemption rulings are in direct conflict with decisions of the Second and Seventh Circuits, as well as this Court's precedents and the considered views of the NLRB, which Congress entrusted to bring uniformity to the regulation of labor-management relations. As discussed in Part I *infra*, both Circuits recognize that, under *Machinists* and *Garmon*, state regulation of noncoercive employer speech is preempted because states "are not permitted to regulate activities that are either expressly permitted . . . by the Act or that are reserved [by the Act] for market freedom." *Metro. Milwaukee*, 431 F.3d at 278 (internal quotation marks and citation omitted). Moreover, both Circuits and the NLRB also recognize that, under *Gould*, 475 U.S. at 288-89, NLRA preemption applies not only to direct regulation, but to state spending restrictions where, as the *en banc* court held here, the purpose of the restriction is "regulatory" and unrelated to any "interest in the efficient procurement of goods and services," Pet. App. 11a. In such circumstances, the proprietary exception identified in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993) ("*Boston Harbor*"), does not apply, and the state's regulatory exercise of its spending power is subject to ordinary preemption analysis.

More fundamentally, as discussed in Part II *infra*, the decision below is completely at odds with this Court's repeated admonition that a state may not use either its spending or regulatory power to alter the NLRA's balance between labor and management. AB 1889's regulatory burden on employers who seek to discuss the drawbacks of unionization obviously and directly impedes Congress's decision, embodied in section 8(c) of the NLRA, to authorize employers to express opinions to deter union organizing efforts, so long as they contain "no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Since such regulatory efforts would plainly be preempted if they were done through direct regulation, California has sought to accomplish the same objective through the backdoor by attaching conditions to state funds. But, as the Court's unanimous decision in *Gould* made clear concerning a similar backdoor effort to leverage public coffers to impose a regulatory burden unrelated to any legitimate proprietary interest, using the power of the purse to disrupt the labor-management balance struck by Congress is also preempted.

As a practical matter, moreover, the decision below, if left unattended, will have a particularly significant negative effect on national labor policy and relations. As discussed in Part III *infra*, following the lead of California and New York, at least fifteen other states have proposed legislation that would impose similar spending restrictions on employers' noncoercive labor speech. It is therefore particularly important that the Court clarify now the respective state and federal roles in labor-management regulation and foreclose states' ongoing efforts to displace both Congress's judgment concerning the desirability of noncoercive employer speech and the NLRB's preeminent role in shaping a uniform, integrated, and federal regulatory scheme for labor relations.

I. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THAT OF THE SECOND AND SEVENTH CIRCUITS AND DISREGARDS THE CONSIDERED VIEWS OF THE NLRB

A. There Is A Circuit Split On Whether The NLRA Protects Noncoercive Employer Speech About Union Organizing From State Interference

The Ninth Circuit determined in this case that neither *Machinists* nor *Garmon* preemption applied to AB 1889 because noncoercive employer speech about union organizing is *not* an activity that the NLRA intended to "protect" or keep free from governmental regulation. The *en banc* court held that *Garmon* was inapplicable because noncoercive employer speech about unionization is not "arguably protected" by the NLRA: "[S]ection 8(c) [of the NLRA] does not *grant* employers speech rights" but merely prohibits "noncoercive speech from being used as evidence of an unfair labor practice." Pet. App. 23a (emphasis in original). The Ninth Circuit also determined that *Machinists* did not apply to AB 1889 because "employer speech in the context of organizing" is not an area intended to be free from regulation, but rather is "extensive[ly] regulat[ed]" by the NLRB. Pet. App. 19a.

In contrast, the Second Circuit held shortly thereafter that state interference with noncoercive employer speech is subject to preemption under both *Machinists* and *Garmon*, and rejected the Ninth Circuit's contrary interpretation of section 8(c) of the NLRA. *See Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, ___ F.3d ___, 2006 WL 3499469 (2d Cir. Dec. 5, 2006). It therefore held preempted portions of New York Labor Law section 211-a which, like AB 1889, provides that "no monies appropriated by the state" to employers may be used "to encourage or discourage union organization."

In conflict with the Ninth Circuit, the Second Circuit held that, under *Garmon*, "section 8(c) itself protects employer speech and that state action impinging on this protection may be preempted." *Healthcare Ass'n*, 2006 WL 3499469, at *7. It expressly rejected the Ninth Circuit's holding in this case that "section 8(c) is a mere place-holder [for the First Amendment] with no labor law function of its own." *Id.* Rather, the Second Circuit recounted that "[m]any courts . . . have affirmed that section 8(c) not only protects constitutional speech rights, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present." *Id.* at *9 (collecting cases). It also specifically rejected the Ninth Circuit's assertion that noncoercive employer speech is not "protected" by section 8(c) because the protection is in the form of immunity from an unfair labor practice finding: "It is surely a familiar concept that one way of granting rights is to state that the government cannot punish certain conduct. For instance, the First Amendment does not explicitly grant freedom of speech, but instead says that 'Congress shall make no law . . . abridging the freedom of speech.'" *Id.* at *10. The *Healthcare Association* court thus held that "section 8(c) embodies a policy of encouraging free speech in the labor context" and that "such a policy necessarily entails freedom from state meddling." *Id.*

With respect to *Machinists* preemption, the Second Circuit held that portions of the New York law were invalid for the same reasons they ran afoul of *Garmon* preemption. The court recognized that these two doctrines are "conceptually complementary" since "*Garmon* preemption applies to conduct that is regulated by the NLRA and *Machinists* preemption applies to conduct that the NLRA left unregulated." *Healthcare Ass'n*, 2006 WL 3499469, at *18. In the context of noncoercive employer speech, they "tend toward the same point" because "the *protection* afforded by section 8(c) is to leave employer speech largely *unregulated*." *Id.* (emphasis added). According to the court,

Congress, in section 8(c), took a "laissez-faire" approach to noncoercive employer speech, thereby prohibiting both NLRB and state restrictions on such speech. *Id.* at *17.

In short, the Second Circuit squarely (and correctly) held that Congress's decision to restrict only coercive speech about unions demonstrates both that noncoercive speech was "left to the free play of economic forces" under *Machinists* and that such speech is "protected" by the NLRA against state interference under *Garmon*. This is clearly irreconcilable with the Ninth Circuit's holding that allowing NLRB regulation of *coercive* speech somehow indicates a desire to permit state regulation of *noncoercive* speech, *see* Pet. App. 19a, and its conclusion that noncoercive speech was unprotected by 8(c), *see* Pet. App. 23a.

As discussed in Part I.B *infra*, the Seventh Circuit and the NLRB also expressly agree that the NLRA preempts state regulation of noncoercive employer speech—such as a law that forbade employers from "requir[ing] their employees to attend meetings . . . in which the employer expresses his opposition to unionization"—because "federal law *allows*" such speech. *Metro. Milwaukee*, 431 F.3d at 280 (emphasis added). This Court should therefore grant certiorari to resolve this conflict, particularly since the Ninth Circuit's determination that neither *Machinists* nor *Garmon* precludes state regulation of noncoercive employer speech plainly authorizes *direct* state and local regulation of this speech.

B. There Is A Circuit Split On Whether State Spending Decisions That Interfere With Noncoercive Employer Speech Are Preempted

The Ninth Circuit also held that, even if *Garmon* and *Machinists* preemption were applicable to direct regulation of noncoercive employer speech, AB 1889 does not burden such speech because "an employer has and retains the freedom to spend its own funds how it wishes; it simply may not spend state grant and program funds on its union-related advocacy." Pet. App. 17a. This alternative holding conflicts

with the Second Circuit's decision in *Healthcare Association* that New York Labor Law section 211-a was preempted insofar as it prohibited employers from using public funds that they had "earned" to speak about unionization. *Healthcare Ass'n*, 2006 WL 3499469, at *12.[2]

Specifically, the Second Circuit held that states could not impose restrictions on "an employer's use of monies earned from state contracts" or from other state programs where the state's reimbursement of the employers can "avoid [union-related] expenses by designating such costs as non-reimbursable." *Healthcare Ass'n*, 2006 WL 3499469, at *15. Thus, states cannot impose funding restrictions where its "reimbursement obligations . . . do not include any costs associated with [prohibited employer speech about unionization]." *Id.* at *19.[3] Such limitations impermissibly "deter[] employers from the exercise of their rights under section 8(c)." *Id.* at *15.

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[2] The Second Circuit held that New York Labor Law section 211-a was not preempted insofar as it applied to money that the state had given employers as a "gift." *Healthcare Ass'n*, 2006 WL 3499469, at *12 n.7. It also assumed, apparently because the plaintiffs did not challenge restrictions on "grants," that "grants" were such "gifts." *Id.* at *12. This conclusion does not affect the conflict with the Ninth Circuit, since that Circuit upheld AB 1889's restrictions on monies *earned* under state programs and the like. We nonetheless note that the vast majority of grants are not mere gratuities. Most grantees earn their money by providing to the state either a direct benefit (*e.g.*, grantee makes proposals for improving state infrastructure) or a societal benefit that inures to the health and welfare of state citizens (*e.g.*, grantee researches a cure for AIDS). NLRA preemption, moreover, turns on the straightforward question whether the state is exercising its spending power in a regulatory manner that interferes with federal labor policy, not on the amorphous issue whether the funds restricted were intended as gifts or in exchange for services rendered.

[3] The Second Circuit remanded the case for factual determinations regarding the exact nature of the funds regulated by New York Labor Law section 211-a. *See Healthcare Ass'n*, 2006 WL 3499469, at *16.

Accordingly, the Second Circuit preempted restrictions attached to "money earned by the employer," such as money from a contract or earned in exchange for service to the public, such as reimbursement for providing health care. In such situations, the state's money is plainly not "subsidizing" any employer speech and any employer expenditures related to union organizing cannot possibly increase the state's costs. Therefore, "the State's asserted proprietary interest in saving money is inapplicable." *Healthcare Ass'n*, 2006 WL 3499469, at *19.

In contrast, the *en banc* majority in the Ninth Circuit upheld restrictions on "money earned" from "state programs," including, as noted in the Statement *infra*, Medi-Cal reimbursement for health care services in nursing homes and the like. *See* Pet. App. 35a n.23. Had the Ninth Circuit employed the Second Circuit's analysis, it would have deemed such restrictions on reimbursements to health care providers preempted, particularly since, as the *en banc* majority itself emphasized, "allowable costs under MediCal" expressly exclude "activities directly related to influencing employees respecting unionization." Pet. App. 35a n.23 (emphases deleted); *see also* Dkt. 32 (SER 47-49). Since the public money provided for the reimbursement excludes from the outset any cost related to unionization, there is simply no *fiscal* reason to attach an additional spending restriction on the reimbursement money that is provided. Because the state's programmatic costs cannot possibly increase by virtue of the employer's union-related expenditures, AB 1889's restriction on the monies provided do not, as the Ninth Circuit conceded, in any way "reflect California's interest in the efficient procurement of goods and services." Pet. App. 11a. The statute's spending restriction is simply a naked attempt to leverage state funds to deter employers from trying to influence employee choice about whether to join a union.

For this reason, the Ninth Circuit's holding here also directly conflicts with the Seventh Circuit's holding in

Metropolitan Milwaukee. In that case, the Seventh Circuit held preempted under the NLRA a county ordinance that regulated the labor relations of employers that contracted with the county. The court specifically condemned the provision of the ordinance that forbade contracting employers from holding meetings "intended to influence an [employee's] decision in selecting or not selecting a bargaining representative" because federal law "allows" such meetings. 431 F.3d at 280. Relying upon this Court's decision in *Gould*, the Seventh Circuit held that "the spending power may not be used as a pretext for regulating labor relations" and that a state "cannot use its spending power as a handle for regulating the labor relations of recipients of County money." *Id.* at 278-80. Because the county's "motive" behind the spending restriction was "dissatisfaction with the balance that the [NLRA] strikes between labor and management," rather than fiscal savings, the court held that its effort to "give the union a leg up" relative to what "federal law permits" is "the kind of favoritism that the [NLRA] anathematizes." *Id.* at 280. Thus, as the dissenters below pointed out, the *en banc* decision here is irreconcilable with *Metropolitan Milwaukee*'s holding that "regulations that specifically target and substantially affect the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds." Pet. App. 51a (Beezer, J., dissenting). AB 1889 is no less pretextual than the ordinance held preempted in *Metropolitan Milwaukee*.

The NLRB made precisely this point in its *amicus* brief to the Ninth Circuit, arguing that AB 1889 was preempted because, "while [the statute] is nominally about state spending decisions, [it] is really an impermissible regulatory attempt to substitute California labor policy for existing federal labor policy." NLRB *Amicus* Brief at 7. Specifically, the Board explained that the stated premise of AB 1889—that "employer speech for or against unionization is inherently an interference with employee choice"—is

contrary to longstanding federal labor policy, which "favors robust debate of union representation issues as a means of enhancing the opportunity for employees to make a free and informed choice." *Id.* at 6-7. The NLRB thus concluded that AB 1889 should be preempted because "California . . . is using its spending powers to handicap employer speech rights that Congress believed to be a positive force in informing employee choice." *Id.* at 13. This "reasonable construction" by the Board is entitled to "considerable deference," *NLRB v. City Disposable Sys. Inc.*, 465 U.S. 822, 829 (1984), because, as this Court has frequently recognized, "[i]t is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy," *Beth Israel Hosp. v NLRB*, 437 U.S. 483, 500 (1978).

Thus, according to the Seventh Circuit and the NLRB, use of the state spending power to interfere with the employer freedoms that the NLRA authorizes—specifically, the right to speak against unionization in a noncoercive way—is preempted. In contrast to the Ninth Circuit, the Seventh Circuit invalidates spending restrictions, such as AB 1889, whose true purpose is influencing labor-management relations, rather than a proprietary purpose satisfying the "market participant" exception. This Court should grant certiorari to resolve this conflict, as well as the conflict with the Second Circuit's *Healthcare Association* decision, and to clarify the appropriate application of preemption analysis to regulatory exercises of the spending power.

II. THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S PREEMPTION PRECEDENTS

This Court's precedents squarely foreclose the Ninth Circuit's conclusions about the general scope of NLRA preemption and the circumstances in which spending restrictions are preempted.

First, it is crystal clear that state laws are preempted if they alter or have the potential to alter the labor-management

balance struck in the NLRA by prohibiting employers, unions, or employees from engaging in conduct—such as noncoercive employer speech—that is expressly authorized by the federal Act. Such state laws impermissibly stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Machinists*, 427 US at 151 (internal quotation marks and citation omitted); *accord Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994). More fundamentally, a hodge-podge of differing state labor regulations undermines the basic "purpose of the Act, [which] was to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Nash-Finch*, 404 U.S. at 144 (internal quotation marks and citation omitted). This "settled preemption principle," applicable to all state laws, has its "greatest force" with respect to a state law, such as AB 1889, "regulating the relations between employees, their unions, and their employer." *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 533 (1979) (plurality opinion); *Boston Harbor*, 507 U.S. at 224.

Thus, as every other lower court and the NLRB have recognized, state restrictions on employer actions that are expressly blessed by the NLRA, such as AB 1889's restriction on noncoercive speech, are preempted under *Machinists* and/or *Garmon*. Since the NLRA prohibits only employer speech that tends to coerce employees, noncoercive speech cannot be restricted by states under *Machinists* because Congress intended that such speech be "one of the economic devices of . . . management" which "neither a state nor the NLRB" has any "flexibility" to "brand unlawful." *Machinists*, 427 U.S. at 144, 149. For essentially the same reason, the Ninth Circuit erred in

concluding that noncoercive speech was not "protected" under *Garmon*.[4]

The Ninth Circuit avoided this inescapable conclusion only by engaging in semantic gamesmanship. Specifically, it found that *noncoercive* employer speech was not intended to

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[4] The *en banc* majority reasoned that noncoercive speech is not "protected" by the NLRA because section 8(c) simply immunizes an employer from liability for engaging in such speech, rather than creating a "right" for employers analogous to employees' rights under section 7 of the Act. Pet. App. 22a-23a. But, of course, the NLRA does not "protect" an *employer's* freedoms by granting them any "rights" relative to their employees. Since, prior to the NLRA, employers already had the freedom to dictate employees' wages, hours, and terms and conditions of employment by virtue of their status as employers, it would make no sense to phrase their freedom to do so as a "right" "bestowed" by the federal government. Rather, employer freedoms, such as the freedom to engage in noncoercive speech, are "protected" by the NLRA by preventing government interference with that freedom, just as the First Amendment "protects" citizens' speech by preventing "Congress" from interfering with it. *See Healthcare Ass'n*, 2006 WL 3499469, at *7. This is why the Court has unambiguously stated that "non-coercive anti-union solicitation" is a "*right protected* by the so-called 'employer free speech' provision of § 8(c) of the [NLRA]." *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362 (1958) (emphases added). Similarly, in applying *Garmon* preemption in *Linn*, this Court recognized that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management," 383 U.S. at 62, and limited state libel claims arising out of labor-management disputes to those involving malice and actual harm in order to "guard against . . . unwarranted intrusion upon free discussion envisioned by the Act," *id.* at 65.

Equally irrelevant is the *en banc* majority's observation that the free speech protected by 8(c) is "guaranteed by the First Amendment." Pet. App. 23a. It matters not whether section 8(c)'s "intent to encourage free debate on issues dividing labor and management" was enacted because Congress thought that such free speech is beneficial public policy or because it thought that this policy was compelled by the First Amendment. *See Linn*, 383 U.S. at 62. The only relevant point is that section 8(c) creates statutory protection for such speech in the labor context.

"be free from *all* regulation" under *Machinists* because the NLRB can regulate *coercive* employer speech. Pet. App. 19a. But, of course, this simply confirms that noncoercive speech is one of the "peaceful methods" available to an employer to deter unionization "free from government interference." *Machinists*, 427 U.S. at 154; *Golden St. Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989).[5] As the *en banc* majority itself noted, this Court has squarely held that:

> [*Machinists*] cases rely on the understanding that in organization and collective bargaining, Congress determined both how much the conduct of unions and employers should be regulated and *how much it should be left unregulated*: The States have no more authority than the Board to upset the balance that Congress has struck between labor and management . . . .

Pet. App. 15a (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751 (1985)) (emphases added). Since Congress left noncoercive speech unregulated, the states may not "upset that" balance" under *Machinists*.

The Ninth Circuit alternatively held that the statute's regulation of noncoercive employer speech was not preempted because California's regulatory goal was accomplished by imposing conditions on state funds, rather than through a generally applicable regulation affecting all employers. *See* Pet. App. 17a-19a. As this Court has squarely held, however, the fact that a state seeks to interfere

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[5] Even the *en banc* majority recognized that *Machinists* preempts a state law that, in the *collective bargaining* process, regulates employer action, including employer speech, that is permitted by the NLRA, even though the NLRB obviously regulates *prohibited* activities relating to the collective bargaining process. Pet. App. 13a-15a. The same is true for the union organizing process. Indeed, there is no support for the *en banc* majority's eventually aborted suggestion that *Machinists* is limited to collective bargaining. *See* Pet. App. 16a.

with NLRA-authorized actions through its "spending power rather than its police power" is a "distinction without a difference." *Gould*, 475 U.S. at 287. Rather, since the "'proper focus'" is on "'the conduct being regulated,'" not the method of regulation, it would "make little sense" to allow otherwise improper state interference with the NLRA's uniform scheme "simply because it operates through state purchasing decisions." *Id.* at 289 (quoting *Lockridge*, 403 U.S. at 292); *see also Garmon*, 359 U.S. at 243 ("[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.").

Under *Gould*, it is impermissible for states to leverage public money to impose burdens on employers that are in addition to the proscriptions of the NLRA. *See* 359 U.S. at 287-89. Here, by burdening employers' noncoercive speech, AB 1889 imposes burdens that are plainly in addition to the NLRA's prohibition of coercive or retaliatory speech. Contrary the Ninth Circuit's view, it is no answer to suggest that California is simply refraining from "subsidizing" employer speech that it finds objectionable. By that logic, Wisconsin, in *Gould*, was simply refraining from subsidizing with its contracting dollars those who had repeatedly violated federal labor law. Indeed, Wisconsin's interference was far less disruptive of the federal scheme than AB 1889 because it only affected those who had *violated* federal norms, not, as here, those who are engaging in activity expressly permitted by federal law. In short, where, as here, spending restrictions are purposely designed to regulate labor relations, rather than to further state's proprietary interests, such funding conditions are preempted.[6]

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[6] For similar reasons, there is nothing to the Ninth Circuit's unprecedented assertion that states have a "deeply rooted" interest in depriving employers of the ability to spend money on union-related activity merely because those funds were received from the state. Again,

To be sure, the burden here is often less draconian than that in *Gould* because the state does not completely prohibit noncoercive employer speech, but only prohibits using a subset of the employers' funds for that purpose (*i.e.*, those received from the state). The Ninth Circuit viewed this distinction as dispositive. Although apparently agreeing that requiring employer neutrality towards unions as a "condition for *receipt* of state funds" would be impermissible interference, it found that "restricting the *use* of state funds" was acceptable because it did not constitute an impermissible burden on First Amendment rights. Pet. App. 17a. But this entirely misses the point. State imposition of *any* serious burden on NLRA-protected speech or activities interferes with conduct that Congress wanted unregulated, and is thus preempted. And there can be no question that AB 1889 imposes significant burdens with both the purpose and effect of coercing employer "neutrality" towards unionization.

Most obviously, with respect to employers, such as petitioner Zilaco Inc., that receive all or virtually all of their revenues for services provided under state programs, the statute does act as a *complete* ban on noncoercive speech. *See* Statement, *supra*. Such employers will simply not have

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the state has no interest, deeply rooted or otherwise, in regulating management's action towards unions because that is a federal concern. The "deeply rooted" interests recognized by *Garmon* and other cases are general state policies unrelated to industrial relations, which incidentally affect management-union relations. *See, e.g.*, *Garmon*, 359 U.S. at 247. Although states do have a legitimate interest in efficient and cost effective services, the court below itself acknowledged that this was not the purpose or effect of AB 1889. *See* Pet. App. 11a. Finally, states do not traditionally or typically impose conditions on an employer's use of its own money *after* it has received that money from the state for services rendered. To the contrary, it is a rare exception to the states' normal indifference to how recipients of state funds spend dollars received under contracts or state programs, and one which raises serious constitutional concerns. *See* pp. 27-28 *infra*.

sufficient funds from non-state sources to engage in the speech expressly authorized by the NLRA.[7]

In addition, AB 1889 plainly imposes severe burdens even on employers that do have sufficient funds from non-state sources to engage in NLRA-protected speech. The Ninth Circuit dismissed this argument solely on the grounds that the restrictions would not impose an impermissible First Amendment burden under *Rust v. Sullivan*, 500 U.S. 173 (1991). *See* Pet. App. 33a-34a. This analogy to First Amendment "unconstitutional conditions" cases, however, is misguided for two related reasons.

First, *Rust* and its progeny upheld funding restrictions because legislatures can "insist that public funds be spent for purposes" that further the government's legitimate programmatic ends. *Rust*, 500 U.S. at 196. Consequently, this "allows the Government to specify the [speech] deemed necessary for its legitimate objectives" and to require that grantees refrain from other speech. *Legal Servs. Corp. v.*

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[7] The *en banc* majority's sole response was its dismissive assertion that this complete ban was "solely the consequence of the employer's free-market choice" because "nothing prevents the employer from raising additional funds from a non-state source." Pet. App. 18a. Of course, it is equally true that "nothing prevents" a citizen from pursuing non-state employment and that nothing prevented the contractors in *Gould* from seeking non-state contracts. But this hardly negates the fact that forcing public employees or contractors to choose between either exercising their speech rights or foregoing public funds constitutes a serious burden on those rights. Indeed, in the First Amendment context, the Court has directly equated the rights of public employees and public contractors to be free from spending restrictions designed to prevent or penalize protected speech. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("[T]he similarities between government employees and government contractors with respect to [free speech rights] are obvious.") And, of course, this Court has "long since rejected Justice Holmes' famous dictum, that a policemen 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Id.* (citation omitted).

Velazquez, 531 U.S. 533, 548 (2001). But here California does not have any *legitimate* regulatory interest in coercing or influencing an employer's federally-protected, non-threatening speech concerning unions. As established above, Congress affirmatively determined that noncoercive employer speech should not be regulated, so the state's effort to influence and burden such speech is preempted. The fact that the state's policy of coercing employer neutrality towards unions might not infringe the employer's First Amendment rights in no way answers the salient preemption question whether that policy impermissibly conflicts with federal labor policy. As *Gould* made clear, the only nonpreempted interest justifying state spending restrictions are proprietary interests that would be followed by any private market participant. Since the Ninth Circuit rightly held that the statute here does not even purport to reflect such fiscal interests, it is preempted.

Second, and in any event, the First Amendment cases plainly establish that limitations on a private entity's use of public funds do impose a "substantial restriction" on the private actor's speech—even if that restriction is constitutionally justified by the government's need to control its programmatic message. *See Velazquez*, 531 U.S. at 544. In *Velazquez*, for example, the Court found that restrictions on the lawsuits that could be brought by private LSC grantees with public funds were unconstitutional, even though those grantees were free to engage in that litigation with their own non-federal funds placed in "affiliate organizations." *See id.* at 556 (Scalia, J., dissenting). Here, a state-funded legal services provider, or even a private law firm paid by the state for representing the state's legal interests, would be barred from using those funds to deal with union organizing. This plainly constitutes a burden at least equivalent to that involved in *Velazquez* and the state's interest is much weaker here, since spending money on *internal* employee relations would not in any way affect or distort the legal services provided.

More specifically, in order to expend funds received from non-state sources, employers must abide by AB 1889's burdensome regulatory regime, bearing the cost of creating segregated accounts for funds derived from a state grant or program, and establishing a separate accounting system that tracks each expenditure related to union organizing and traces it to non-"state" funds. This Court has repeatedly held that the cost and practical difficulties of complying with regulations requiring such separate, segregated accounts "make[s] engaging in protected speech a severely demanding task" that "burdens First Amendment rights." *FEC v. Mass. Citizens for Life, Inc.* 479 U.S. 238, 255-56 (1986) (invalidating under the First Amendment federal statutory requirements to "establish a 'separate segregated fund'" and to comply with "[d]etailed record-keeping and disclosure obligations" in order to engage in independent political expenditures). While the Court has at times upheld laws requiring that speech be conducted through segregated accounts, it has only done so when "justified by a compelling state interest" and has uniformly recognized that such requirements "burden expressive activity." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990). It therefore simply cannot be disputed that AB 1889's requirement that "private" funds be segregated to engage in union-related activities creates a severe burden and "disincentive" to engage in such activities. *Id.* AB 1889 therefore plainly "stands as an *obstacle* to accomplishment and execution of the full purposes" of the NLRA, regardless whether it constitutes an unconstitutional burden under the First Amendment. *Livadas*, 512 U.S. at 120 (internal quotation marks and citation omitted; emphasis added).

In addition, AB 1889 authorizes taxpayer lawsuits, which may, for example, be brought by unions to gain leverage in an ongoing organizing dispute with an employer. A union can hale an employer into court simply by alleging that the employer's recordkeeping is "[in]sufficient," a critical term that AB 1889 does not define. At that point, the employer is

faced with the legal costs of defending itself, and the near-certainty of a discovery request into its financial and business records. More important, the employer faces the prospect of *treble* damages payable to the state and an award of attorney's fees.[8]

Moreover, whereas AB 1889 induces employers to capitulate to unionization by offering state funds for "voluntary recognition agreements," it deters employers from resisting union organization by imposing costly administrative requirements that must be followed on pain of treble damages. AB 1889 is thus an example of a "funding scheme [that] is 'manipulated' to have a 'coercive' effect on those who do not hold the subsidized position" on unions. *Velazquez*, 531 U.S. at 552 (Scalia J., dissenting) (quoting *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 587 (1998)).

Finally, the Ninth Circuit's analysis is premised on the fundamentally erroneous notion that money which an employer receives from the state for services rendered to the state or its citizenry somehow remains the *state*'s money. But as the dissenting opinion below and the Second Circuit have correctly noted, money received from the state for goods or services is not the state's money any more than money received from a private purchaser remains the private purchaser's money after it has been transferred to the employer. Pet. App. 85a-87a (Beezer, J., dissenting); *Healthcare Ass'n*, 2006 WL 3499469, at *14-15. This is particularly true since the employer speech regulated here relates to its own internal operations, not to any message that the employer would deliver to the public as part of a government-funded program. Thus, "there is no

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[8] This concern is not hypothetical; before AB 1889 was enjoined by the district court, several unions filed or threatened to file lawsuits against employers. *See, e.g.*, Pet. App. 64a-65a; Dkt. 30 (SER 26-45).

programmatic message of the kind recognized in *Rust*" which government-funded service providers need to adhere to, so that the program can work as planned. *Velazquez*, 531 U.S. at 548. There is, indeed, no nexus at all between the government's programmatic goals and the employer's union-related speech and thus, unlike *Rust*, no conceivable basis for suggesting that the employer's speech "amount[s] to governmental speech." *Id.* at 541.

In sum, contrary to this Court's clear precedents, the Ninth Circuit erred in holding that even direct regulation of noncoercive speech is not preempted by the NLRA's express authorization of that speech and also in its alternative holding that the state's prohibition against engaging in such speech with state-derived funds is not a cognizable burden on that activity.

III. THIS CASE RAISES AN IMPORTANT QUESTION THAT WILL HAVE A SIGNIFICANT EFFECT ON FEDERAL LABOR POLICY

As this Court has explained, Congress enacted the NLRA, "a comprehensive national labor law," because of "the perceived incapacity of . . . state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict." *Lockridge*, 403 U.S. at 286. The NLRA contains no express preemption provision, and it has therefore fallen on the judiciary to "translate[] into concreteness" which state regulations are, and which are not, displaced by supreme federal labor law. *Garmon*, 359 U.S. at 241. That is a vital task that merits this Court's consideration, as this Court has frequently noted in granting certiorari in NLRA preemption cases. *Livadas*, 512 U.S. at 116 (granting certiorari "to address the important questions of federal labor law implicated by the [state's] policy"); *N.Y. Tel.*, 440 U.S. at 527 (granting certiorari because of "[t]he importance of the question" whether the NLRA preempted a state unemployment-benefits law); *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 237-38 (1967) (granting certiorari

"because of the important constitutional question involved, specifically whether the [state law] violates the Supremacy Clause of the Constitution (Art. VI cl. 2) because it allegedly 'frustrates' enforcement of the [NLRA]").

AB 1889 is part of a concerted effort to spur union organizing by both silencing anti-union employer speech and subsidizing employer neutrality in organizing campaigns. Accordingly, certiorari review here is particularly critical. As shown in Part I.B *supra*, AB 1889 is a viewpoint-based restriction that specifically targets anti-union speech. AB 1889's threat of union lawsuits and treble damages will chill speech that Congress and the NLRB deem essential if employees are to make informed decisions whether or not to bargain collectively. Notwithstanding AB 1889's direct and substantial interference with the federal scheme governing union organization, the Ninth Circuit here held that ordinary NLRA preemption analysis does not apply to regulatory exercises of the state spending power. That holding leaves a gaping hole in NLRA preemption given the amount of money states and localities expend each year (California, for example, annually expends over $127 billion, *see* http://www.ebudget.ca.gov/BudgetSummary/SCD/1249579.html (last visited Jan. 4, 2007)). Indeed, because the *en banc* court held that noncoercive employer speech is not an activity that is protected under *Garmon* or an activity left free from regulation under *Machinists*, its holding authorizes even *direct* regulation of noncoercive employer speech. It is thus no surprise that the General Counsel for respondent AFL-CIO called the Ninth Circuit's ruling "'a real win for organizing.'" 185 Daily Lab. Rep. (BNA) A-8 (Sept. 25, 2006).

AB 1889, moreover, is but one of a number of similar enacted and proposed state statutes that, in the aggregate, will impose substantial and idiosyncratic administrative burdens on employers that choose to oppose unionization. In addition to New York Labor Law section 211-a, similar legislation has been proposed in Arizona, Connecticut,

Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Missouri, New Hampshire, North Dakota, Oregon, and Pennsylvania. Dkt. 66 (SER 77-281). Counties and any other local governmental entities with spending power may also follow suit. *See, e.g., Metro. Milwaukee*, 431 F.3d at 277. If AB 1889 "is valid, nothing prevents other States from taking similar action," and "[e]ach additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the integrated scheme of regulation created by Congress." *Gould*, 475 U.S. at 288-89. The *en banc* majority's sweeping opinion upholding AB 1889 threatens precisely the type of variegation that the NLRA intended to stamp out. *See Garner v. Teamsters, Chauffeurs & Helpers Local Union*, 346 U.S. 485, 490-91 (1953). AB 1889, in sum, is the wedge that will allow other states and localities to irremediably alter the federal labor policy favoring noncoercive employer speech, and this Court needs to intervene now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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January 5, 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

No. 03-55169

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC

CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

and

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
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BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants-Appellants.

Appeal from the United States District Court for the Central District of California Gary L. Taylor, District Judge, Presiding.

Filed September 21, 2006.

Before SCHROEDER, Chief Judge, REINHARDT, BEEZER, KOZINSKI, KLEINFELD, HAWKINS, THOMAS, SILVERMAN, McKEOWN, WARDLAW, FISHER, PAEZ, RAWLINSON, CLIFTON and CALLAHAN, Circuit Judges.

Opinion by Judge FISHER; Dissent by Judge BEEZER.

FISHER, Circuit Judge.

The question before us is whether a state's exercise of its sovereign power to control the use of its funds conflicts with national labor policy as expressed in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151-169. Specifically,

two provisions in a California statute forbid employers who receive state grant or program funds in excess of $10,000 from using those funds to assist, promote or deter union organizing. We hold that California's grant and program fund restrictions do not undermine federal labor policy, are not pre-empted by the NLRA and do not violate the First Amendment.

FACTUAL BACKGROUND

On September 28, 2000, California enacted Assembly Bill No. 1889, Cal. Gov't Code § 16645-16649 (collectively, "AB 1889"). The preamble of the statute declares:

> It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization and to prohibit an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract.

§ 16645, Historical and Statutory Notes, Section 1 of Stats.2000, c. 872.

Two provisions of the California statute, sections 16645.2 and 16645.7, are at issue in this appeal.[1] Section 16645.2(a) bars private employers who are "recipient[s] of a grant of state funds" from "us[ing] the funds to assist, promote, or deter union organizing." Section 16645.7(a) bars "[a] private employer receiving state funds in excess of [$10,000] in any calendar year on account of its participation in a state

[1] The parties stipulated to the district court's entry of a partial final judgment as to preemption of § 16645.2 and § 16645.7 to facilitate prompt appellate review of the district court's preemption ruling regarding these two sections only.

program" from using program funds "to assist, promote, or deter union organizing." The phrase "assist, promote, or deter union organizing" includes "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . . [or] [w]hether to become a member of any labor organization." § 16645(a)(1)-(2). The statute specifies as prohibited "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." § 16646(a). Expressly exempted from the statute's reach are "activit[ies] performed" or "expense[s] incurred" in connection with "[a]ddressing a grievance or negotiating or administering a collective bargaining agreement" and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." § 16647(a), (d).

The statute requires employers covered by sections 16645.2 or 16645.7 to certify that no state funds will be used to assist, promote or deter union organizing. § 16645.2(c), 16645.7(b). It also requires employers who make expenditures to assist, promote or deter union organizing to maintain and provide upon request "records sufficient to show that state funds have not been used for those expenditures." § 16645.2(c), 16645.7(c).[2] If an employer

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[2] Despite the absence of any finding by the district court that § 16645.2(c) and § 16645.7(c) are onerous, the dissent insists that these provisions entail "burdensome and detailed record-keeping," impose "seemingly impossible compliance burdens" and are "daunting." (Dissent at 1102, 1103.) The dissent even suggests that these provisions require "an employer [to] create and maintain two completely separate accounting and payroll systems." (Dissent at 1103.) The statute, however, does not require "employers to maintain records in any particular form," § 16648, and leaves employers free to design their

commingles state and other funds, the statute presumes that any expenditures to assist, promote or deter union organizing derive in part from state funds. § 16646(b).

Employers who violate sections 16645.2 or 16645.7 are subject to fines and penalties, which include the disgorgement of the state funds used for the prohibited purposes and a civil penalty paid to the state that is equal to twice the amount of those funds. § 16645.2(d), 16645.7(d). Suspected violators may be sued by the state Attorney General or by any private taxpayer. § 16645.8(a)-(c). Prevailing plaintiffs, and prevailing taxpayer intervenors who make substantial contributions to an action under this section, are "entitled to recover reasonable attorney's fees and costs."[3] § 16645.8(d).

In April 2002, plaintiffs-appellees (collectively, the "Chamber of Commerce") brought an action for injunctive and declaratory relief challenging the statute facially on

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accounting and payroll systems however they wish, provided only that they have "records sufficient to show that state funds have not been used" to assist, promote or deter organizing. § 16645.2(c), 16645.7(c). Moreover, the only expert testimony in the record on these provisions states that they provide employers "flexibility in establishing proper accounting procedures and controls," impose no burden greater than numerous other common grant restrictions and in fact "appear to be significantly less burdensome than the detailed requirements for federal grant recipients. . . ."

[3] The dissent finds it significant that the statute allows private taxpayers to sue suspected violators. (Dissent at 1102.) In this respect, the statute is no different from any number of other federal and state laws or qui tam causes that enable private attorneys general to help detect, punish and deter wrongdoing. In contrast to some such statutes (e.g., § 4 of the Clayton Act, 15 U.S.C. § 15), which encourage private suits by permitting plaintiffs to be awarded treble damages, AB 1889 only allows private litigants to recover attorney's fees and costs-the damages go to the state. *See* § 16645.8(d).

numerous grounds, including NLRA preemption. The AFL-CIO and others (collectively, the "AFL-CIO") intervened. In May 2002, the Chamber of Commerce moved for summary judgment. Defendants, who are the California Department of Health Services and state officials sued in their official capacity (collectively, "California"), filed cross motions for summary judgment in August 2002.

On September 16, 2002, the district court granted partial summary judgment in favor of the Chamber of Commerce. The district court determined that the NLRA preempted sections 16645.2 and 16645.7 under the Supreme Court's *Machinists* doctrine because the provisions "regulate[d] employer speech about union organizing under specified circumstances, even though Congress intended free debate." *Chamber of Commerce v. Lockyer,* 225 F.Supp.2d 1199, 1205 (C.D.Cal.2002); *see Lodge 76, Int'l Ass'n of Machinists v. Wisc. Employment Relations Comm'n,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976). The district court entered judgment in January 2003 and issued an injunction prohibiting California and the AFL-CIO from taking any actions to enforce sections 16645.2 and 16645.7 against any employer subject to the NLRA. California and the AFL-CIO appealed.

A three-judge panel of our court affirmed the district court, but the panel then withdrew its opinion upon the grant of appellants' petition for panel rehearing. *Chamber of Commerce v. Lockyer,* 364 F.3d 1154 (9th Cir.2004), *withdrawn and reh'g granted,* 408 F.3d 590 (9th Cir.2005). On rehearing, a divided panel issued a second opinion, *Chamber of Commerce v. Lockyer,* 422 F.3d 973 (9th Cir.2005), which was in turn vacated and withdrawn from publication for reconsideration en banc. *See Chamber of Commerce v. Lockyer,* 435 F.3d 999 (9th Cir.2006); *Chamber of Commerce v. Lockyer,* 437 F.3d 890 (9th Cir.2006). We now reverse the district court's judgment that the NLRA preempts the California statute and vacate the court's injunctive order.

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment and preemption analysis. *See Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir.2003); *Ting v. AT & T*, 319 F.3d 1126, 1135 (9th Cir.2003). "A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (internal quotation marks and citation omitted).

DISCUSSION

I. Market Participant Exception

Before addressing the merits of the preemption issue, we must first decide whether California's condition on the use of its funds constitutes "regulation." "A prerequisite to preemption [under the NLRA] is a finding that the state or local action in question constitutes *regulation* of labor relations between employers and employees." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir.1996). The NLRA "does not preempt actions taken by a state when it . . . acts as a mere proprietor or market participant." *Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1037 (9th Cir.1999) (citing *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (" *Boston Harbor* ")). We conclude that California has acted as a regulator in enacting sections 16645.2 and 16645.7, and that the market participant exception does not apply.

Two Supreme Court cases define the scope of the market participant exception: *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), and *Boston Harbor*, 507 U.S. at 218, 113 S.Ct.

1190.[4] In *Gould*, the Court addressed a Wisconsin statute that forbade state procurement agents from using state funds to purchase products manufactured or sold by "labor law violators," i.e., employers who had violated the NLRA three times within a five-year period. 475 U.S. at 283-84, 106 S.Ct. 1057. Wisconsin conceded that it did not have the power to "bar its residents from doing business with repeat violators of the NLRA." *Id.* at 287, 106 S.Ct. 1057. It argued, however, that its statutory scheme was not unlawful because the statute merely regulated the spending power of its procurement officers. *Id.* The Court found this to be a "distinction without a difference" because the Wisconsin statute "serve[d] plainly as a means of enforcing the NLRA." *Id.* Wisconsin "concede[d], as [the Court thought] it must, that the point of [its] statute is to deter labor law violations and to reward fidelity to the law." *Id.* (internal quotation marks omitted). The Court emphasized the "rigid and undiscriminating manner in which the statute operate[d]," and concluded that "[n]o other purpose could credibly be ascribed" to the statute than creating an additional remedy for violations of the NLRA. *Id.* at 287, 106 S.Ct. 1057.

In *Boston Harbor*, on the other hand, the Court held that the Massachusetts Water Resources Authority, a state agency, acted as a market participant when it required contractors working on the cleanup of Boston Harbor to agree to the terms of a project labor agreement negotiated by a project construction manager and a labor union. 507 U.S. at 232, 113 S.Ct. 1190. The Court concluded that there was

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[4] Our discussion here is limited to the context of the market participant exception under the NLRA. A market participant exception exists in a number of other contexts, such as cases under the Commerce Clause. *See, e.g., Big Country Foods, Inc. v. Bd. of Educ. of Anchorage*, 952 F.2d 1173, 1177-79 (9th Cir.1992) (discussing market participant exception in the dormant Commerce Clause context). We do not opine on the applicability of our reasoning to the market participant exception in these other contexts.

"no question but that [the state agency] was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.* The Court also noted that "the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project," and that there was no reason to believe that the government was motivated by anything other than purely proprietary interests. *Id.*

We have applied these cases in a number of contexts without formulating a general rule about when the market participant exception applies. We have held that the market participant exception did not apply to a California law that permitted employees in state-approved apprenticeship programs to receive less than the prevailing wage, but required employees in non-approved apprenticeship programs to receive the prevailing wage. *Dillingham,* 190 F.3d at 1037-38 (noting that the apprenticeship standards were not "based upon unique needs that the . . . project presented" and that the state was not motivated by "management concerns" in implementing the standards). On the other hand, we have applied the exception and held that the City of Oakland was a market participant when it canceled a newspaper subscription and refused to continue to pay for advertising during a labor dispute. *Alameda Newspapers,* 95 F.3d at 1415-16. And we have held that a city may require private contractors to adhere to the terms of a collective bargaining agreement when doing business with the city. *Associated Builders & Contractors, Inc. v. City of Seward,* 966 F.2d 492, 496 (9th Cir.1992).[5]

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[5] *City of Seward,* which was decided before *Boston Harbor*, creates some confusion about the relation of the market participant exception to other NLRA preemption doctrines. *City of Seward* concluded that "action taken by the state as a market participant is not automatically immune from NLRA preemption." 966 F.2d at 495. *Boston Harbor*, however, held explicitly that the "[NLRA] preemption doctrines apply only to state *regulation*," and that "a State may act without offending the pre-emption

These cases teach that when a state uses its spending power in a manner that is essentially not proprietary, the market participant exception will not apply and the state action may be subject to NLRA preemption. We draw upon the reasoning of the Fifth Circuit, which asks two discrete questions to determine when the market participant exception applies:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir.1999).

The first question, which looks to the nature of the expenditure, protects comprehensive state policies with wide application from preemption, so long as the type of state action is essentially proprietary. *See, e.g., N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin,* 431 F.3d 1004, 1007 (7th Cir.2005) (state law requiring recipients of state grants for the construction of renewable-fuel plants to

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principles of the NLRA when it acts as a proprietor." 507 U.S. at 227, 229-30, 113 S.Ct. 1190. *Boston Harbor*, therefore, makes clear that once a state's action falls within the "market participant" exception, it is not preempted under the NLRA. To the extent that *City of Seward* states otherwise, we hold it overruled.

enter into a project labor agreement was not preempted, where the condition was limited to the project financed by the state grant); *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 34-36 (D.C.Cir.2002) (executive order applying to all federally funded construction projects was not pre-empted, where the order concerned a project labor agreement that private employers often enter into in the construction field). The second question, which looks at the scope of the expenditure, protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation. *See, e.g., Alameda Newspapers*, 95 F.3d at 1417-18. Each question constitutes a separate method of determining whether the state action at issue actually constitutes regulation, and a state need not satisfy both questions to be deemed to act as a market participant.

Here, we conclude that sections 16645.2 and 16645.7 are regulatory and are not protected by the market participant exception. The statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services, as measured by the similar behavior of private parties. Rather, the statute's preamble makes clear that the legislation's purpose is to prevent "state funds and facilities" from being used to subsidize an employer's attempt to influence employee choice about whether to join a union. *See* § 16645, Historical and Statutory Notes, Section 1 of Stats.2000, c. 872 ("It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing.").

Nor do sections 16645.2 and 16645.7 have a narrow scope or other element indicating that the statute is unrelated to broader regulation. To the contrary, the statute by design sweeps broadly, applying to all employers in California who accept any state grant or program funds in excess of $10,000.

§ 16645.2, 16645.7. It requires any business that accepts state grant or program funds in excess of $10,000 to maintain records sufficient to show that these funds were not used to assist, promote or deter organizing. *Id.* It contains a provision for civil penalties and permits private parties to file civil actions against employers who violate the statute. § 16645.8. The statute's scope indicates a general state position of neutrality with regard to organizing, not a narrow attempt to achieve a specific procurement goal. These considerations counsel that sections 16645.2 and 16645.7 are regulatory measures that fall outside the market participant exception.[6]

II. NLRA Preemption

That sections 16645.2 and 16645.7 are regulatory does not mean that they are also preempted by the NLRA. "We are reluctant to infer pre-emption," *Boston Harbor,* 507 U.S. at 224, 113 S.Ct. 1190, and any analysis of preemption begins with the "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). Preemption is a question of congressional intent, and the "'purpose of Congress is the ultimate touchstone' of preemption analysis." *Alameda Newspapers,* 95 F.3d at 1413 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)). Although the NLRA contains

[6] This case is thus distinct from *Alameda Newspapers,* where we concluded that a city's proclamation of support in favor of a labor union in an ongoing strike at a local newspaper, and the city's decision to refrain from purchasing advertisements and to cancel its subscriptions as a result of the strike, did not constitute regulation subject to NLRA preemption. 95 F.3d at 1409. There, we emphasized the merely exhortatory nature of the proclamation, noting that "[t]he resolution ha[d] no binding force on anyone." *Id.* at 1414. We also concluded that the city's cancellation of subscriptions and refusal to advertise did not "have some 'real effect' or practical economic impact on the employer that [wa]s either different from that of the ordinary customer or . . . otherwise governmental in nature." *Id.* at 1416.

no express preemption provision, the Supreme Court has articulated two distinct NLRA preemption doctrines: *Machinists* preemption, set forth in *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), and *Garmon* preemption, set forth in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). We hold that sections 16645.2 and 16645.7 are not preempted under either *Machinists* or *Garmon.*

A. Machinists *Preemption*

Machinists preemption operates as a form of labor field preemption. It requires the preemption of any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress "to be controlled by the free play of economic forces," *Machinists,* 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation marks and citation omitted), in a "zone free from all regulations, whether state or federal." *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190. The doctrine "is based on the premise that 'the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining,' " which means that "neither a state nor the National Labor Relations Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful.' " *Alameda Newspapers,* 95 F.3d at 1413 (quoting *Machinists,* 427 U.S. at 144, 149, 96 S.Ct. 2548). "*Machinists* pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests" in an area free from regulation. *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks and citation omitted).

Federal courts of appeals have applied *Machinists* pre-emption in the context of collective bargaining between organized labor and employers, not in the context of

organizing, which is the subject of AB 1889.[7] *Machinists* itself dealt with a collective bargaining dispute in which union members refused to accept overtime assignments during labor contract renewal negotiations. The Supreme Court held that "state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB," and that "federal labor policy and the federal Act have pre-empted state regulatory authority to police the use by employees and employers of peaceful methods of putting economic pressure upon one another." 427 U.S. at 153, 154, 96 S.Ct. 2548. In *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103, 110-11, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989), the Court stated that "[i]n *Machinists,* we reiterated that Congress intended to give parties to a collective-bargaining agreement the right to make use of 'economic weapons,' not explicitly set forth in the Act, free of governmental interference."[8] And in *Metropolitan Life Insurance Co. v. Massachusetts,* where a state statute mandating minimum healthcare benefits was held not to be preempted, the Court explained:

> [*Machinists*] cases rely on the understanding that in organization and collective bargaining, Congress

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[7] The dissent contends that *Machinists* preempts AB 1889 because the California statute "specifically targets and substantially affects the NLRA *bargaining process.*" (Dissent at 1106 (emphasis added).) But AB 1889 applies only to organizing, not collective bargaining.

[8] In the Court's 1989 *Golden State Transit Corp.* decision, it held that the taxi company was entitled to maintain a § 1983 action against Los Angeles for the city's violation of the company's right (as stated in the Court's 1986 decision, *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) ("*Golden State I*")), to be free from interference with its choice and use of economic weapons in the collective bargaining process. In *Golden State I,* the Court had held that the city's refusal to renew the taxi company's franchise because the company's employees were on strike was preempted under *Machinists.*

> determined both how much the conduct of unions and employers should be regulated, and how much it should be left unregulated: The States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective-bargaining relationship. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits. All parties correctly understand this case to involve *Machinists* pre-emption.

471 U.S. 724, 751, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (internal quotation marks and citation omitted).

We have also held that " *Machinists* preemption prohibits states from imposing restrictions on labor and management's 'weapon[s] of self-help' that were left unregulated in the NLRA because Congress intended for tactical bargaining decisions and conduct 'to be controlled by the free play of economic forces.' " *Associated Builders & Contractors of S. Cal. v. Nunn*, 356 F.3d 979, 987 (9th Cir.2004) (alteration in original) (quoting *Machinists*, 427 U.S. at 140, 146, 96 S.Ct. 2548); *see also St. Thomas-St. John Hotel & Tourism Ass'n., Inc. v. Gov't of U.S.V.I. ex rel. V.I. Dep't of Labor*, 357 F.3d 297, 302 n. 4 (3d Cir.2004) ("Machinists preemption is a form of conflict pre-emption under which state regulation of the bargaining conduct of private parties is displaced because it conflicts with the purpose of Congress in enacting the NLRA to leave that conduct to be controlled by the free play of economic forces." (internal quotation marks and citation omitted)); *McNealy v. Caterpillar, Inc.*, 139 F.3d 1113, 1117 n. 1 (7th Cir.1998) ("The Machinists doctrine similarly preempts state regulation of the economic weapons that Congress intended to leave available to unions and employers."); *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 370-71 (8th Cir.1991) (invoking *Machinists* preemption in a "state's intrusion into the bargaining process" between organized labor and an employer); *Derrico*

v. Sheehan Emergency Hosp., 844 F.2d 22, 29 (2d Cir.1988) ("Our analysis of the [*Machinists*] pre-emption issues similarly accords with the principle that the parties' intent must govern the duration of their collectively bargained agreements."). Insofar as all these cases concern collective bargaining, they suggest that *Machinists'* principal and native application is limited to that sphere of activity, where Congress enacted an "intentional balance between the uncontrolled power of management" and organized labor to advance their respective interests in negotiating the terms and conditions of employment. *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks and citation omitted). Correspondingly, these cases strongly suggest that the *Machinists* doctrine is not likely to apply to organizing, a conclusion that the Chamber of Commerce conceded during oral argument when it acknowledged that interference with organizing is "typically" analyzed under the *Garmon* doctrine.[9]

We need not resolve whether *Machinists* extends to pre-empting a state action that potentially affects organizing, because even if it did, AB 1889 would not be preempted under the *Machinists* doctrine. In enacting a restriction on the use of state grant and program funds with the purpose of remaining neutral in labor disputes, California has not intruded on conduct meant to be left to the free play of economic forces, an area free from all governmental regulation. Indeed, it is implausible that Congress intended the use of such funds to be an area "unregulated because left

[9] Secondary sources also discuss *Machinists* in the context of collective bargaining, not organizing. *See, e.g.*, N. Peter Lareau, 2 *Labor and Employment Law* 36.11-36.17 (2005); Robert A. Gorman, *Labor Law* 1103-10 (2004); Patrick Hardin et al., 2 *The Developing Labor Law* 2192-99 (2002); Robert Rachal, Machinists *Preemption Under the NLRA: A Powerful Tool to Protect an Employer's Freedom to Bargain,* 58 La. L.Rev. 1065, 1065 (1998) ("To protect the collective bargaining process from [attempts by government to alter collective bargaining], the Supreme Court developed *Machinists* preemption.").

to be controlled by the free play of economic forces," *Machinists*, 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation marks omitted), when the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces. *See Boston Harbor*, 507 U.S. at 225-26, 113 S.Ct. 1190.

In any event, AB 1889's restrictions on the use of grant and program funds do not interfere with an employer's ability to engage in "self-help" in the sense protected by *Machinists*. Unlike in *Gould* and *Golden State I*, the state has not engaged in a naked attempt to use its spending power to "introduce some standard of properly balanced bargaining power" or to alter employers' private spending decisions. *Machinists*, 427 U.S. at 149-50, 96 S.Ct. 2548 (internal quotation marks and citation omitted). In restricting the *use* of state funds, California has not made employer neutrality or the substantive terms of employment between employer and employee a condition for the *receipt* of state funds. Under AB 1889, an employer has and retains the freedom to spend its own funds however it wishes; it simply may not spend state grant and program funds on its union-related advocacy. In contrast, had California enacted a statute that required neutrality as a condition of receiving state funds, the employer's use of its own funds would thereby have been curtailed. *See infra* pp. 1096-98.

The National Labor Relations Board ("NLRB"), which filed an *amicus curiae* brief in support of the Chamber of Commerce, nonetheless urges that *Machinists* does preempt the California statute. It cites *Alto Plastics Manufacturing Corp.*, 136 N.L.R.B. 850, 851 (1962), for the proposition that in a representation election, "employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative." The NLRB contends that AB 1889 works at cross purposes with such a policy because it limits the flow of information to employees by regulating employer speech

in an area-an organization election-that Congress *did* intend to be controlled by the free play of economic forces.

We disagree with the way in which the NLRB characterizes AB 1889 and invokes *Machinists*. As explained above, the California statute does not prevent an employer from using non-state funds to assist, promote or deter organizing; it only restricts a recipient's use of state grant and program funds (in excess of $10,000) for that purpose. Consequently, the California statute does not impede the flow of information to employees by regulating employers' speech. Employers remain free to convey their views regarding unionization, and thus to exercise their First Amendment rights, provided only that they do not use state grant and program funds to do so.[10] For example, even if an employer made a business decision to fund its operations entirely through the receipt of state grants, such that the statute effectively prevented that employer from spending any portion of its revenues to advocate during an organization election, that effect would be incidental and solely the consequence of the employer's free-market choice. Nothing prevents the employer from raising additional funds from a non-state source and using those funds for advocacy purposes. It is well established that a legislature may attach "reasonable and unambiguous" conditions to funds that a recipient is not obligated to accept. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, ___ U.S. ___, 126 S.Ct. 1297, 1306, 164 L.Ed.2d 156 (2006) (internal quotation marks omitted); *see also Lavin*, 431 F.3d at 1006 (citing *Rust*, 500 U.S. at 173, 111 S.Ct. 1759; *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141

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[10] The statute's effect is therefore [illegible] and incidental, not unlike the Massachusetts law upheld in *M[illegible]ife*. *See* 471 U.S. at 755, 105 S.Ct. 2380 ("Minimum state labor standards . . . neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act.").

L.Ed.2d 500 (1998); *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)). We "cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Metro. Life,* 471 U.S. at 757, 105 S.Ct. 2380 (internal quotation marks omitted).

More fundamentally, the NLRB is simply incorrect to suggest that *Machinists* preempts the California statute. As the NLRB acknowledges elsewhere in its brief, *Machinists* applies *solely* to zones of activity left free from *all* regulation. *See Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190. The NLRB's own extensive regulation of organizing activities demonstrates that *organizing*-and employer speech in the context of organizing-is not such a zone. *See, e.g., Peoria Plastic Co.,* 117 N.L.R.B. 545, 547-48 (1957) (NLRB barring interviews with employees in their homes immediately before an election); *Peerless Plywood Co.,* 107 N.L.R.B. 427, 429 (1953) (NLRB barring employers and unions alike from making election speeches on company time to massed assemblies of employees within 24 hours of an election). *See also NLRB v. A.J. Tower Co.,* 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322 (1946) ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.").[11] Indeed, section 9 of the NLRA affirmatively grants the NLRB power to regulate employer and union

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[11] Like the NLRB, the dissent undermines its own argument when it cites Board decisions as examples of the NLRB's regulation of the organizing process. (Dissent at 1105.) *Machinists* applies only to zones free from all regulation, and the NLRB decisions show that organizing is not such a zone. "A state law that both explicitly targets and directly regulates processes controlled by the NLRA" might be preempted under *Garmon, see infra* p. 1090, but is surely not preempted "under the *Machinists* doctrine." (Dissent at 1105.)

conduct, including speech, that is prejudicial to a fair election. 29 U.S.C. § 159. In *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 60, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), the Supreme Court observed that the NLRB can set aside an election where a material fact has been misrepresented in the representation campaign, opportunity for a reply was lacking and the misrepresentation had an effect on the free choice of voting employees. The Court likewise noted that in a number of cases, the NLRB had even determined that use of "epithets such as 'scab,' 'unfair,' and 'liar,' " though not so indefensible as to remove them from the protection of section 7, could lead the NLRB to set aside an election if such epithets had "been uttered with actual malice, a deliberate intention to falsify or a malevolent desire to injure." *Id.* at 60-61, 86 S.Ct. 657 (citing *Bettcher Mfg. Corp.*, 76 N.L.R.B. 526 (1948); *Atl. Towing Co.*, 75 N.L.R.B. 1169, 1170-73 (1948) (internal quotation marks omitted)). *See also Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982) ("[W]e will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made. . . .").

Significantly, the spending restrictions challenged by the Chamber of Commerce and NLRB are modeled precisely on those that Congress has enacted when prohibiting the use of federal funds to assist, promote or deter organizing. *See, e.g.*, Workforce Investment Act, 29 U.S.C. § 2931(b)(7) ("Each recipient of funds . . . shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing."); National and Community Service State Grant Program, 42 U.S.C. § 12634(b)(1) ("Assistance provided under this title shall not be used by program participants and program staff to . . . assist, promote, or deter union organizing."); Head Start Programs Act, 42 U.S.C. § 9839(e) ("Funds appropriated to carry out this sub-chapter shall not be used to assist, promote, or deter union organizing."); *see also* Medicare

Act, 42 U.S.C. § 1395x(v)(1)(N) ("In determining such reasonable costs, costs incurred for activities directly related to influencing employees respecting unionization may not be included."). These restrictions are inconsistent with a congressional belief that union organizing involves "conduct intended to be unregulated." *Golden State Transit Corp.*, 475 U.S. at 614, 106 S.Ct. 1395 (internal quotation marks omitted). Instead, because an area left to the free play of economic forces is a "zone free from *all* regulations, *whether state or federal*," *Boston Harbor*, 507 U.S. at 226, 113 S.Ct. 1190 (emphasis added), the federal restrictions are compelling evidence that the analogous conditions in AB 1889 do not intrude in a regulation-free area of labor relations and thus, contrary to the dissent's suggestion, do not "operate to frustrate the purpose" of the NLRA. (Dissent at 11821, quoting *Local 20, Teamsters v. Morton*, 377 U.S. 252, 258, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964).) "The fact that Congress itself has . . . imposed the same type of restriction . . . as [a state] seeks to impose . . . is surely evidence that Congress does not view such a restriction as incompatible with its labor policies." *De Veau v. Braisted*, 363 U.S. 144, 156, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) (plurality opinion).[12]

In sum, the mechanism California has employed to preserve its neutrality in labor disputes does not affect an employer's ability to use its own funds in connection with

[12] The Supreme Court engaged in similar reasoning in *Metropolitan Life*, 471 U.S. at 754-55, 105 S.Ct. 2380. There, the Court held that no incompatibility existed between national labor policy expressed in federal rules designed to restore the equality of bargaining power and state legislation that imposed minimal substantive requirements (in the form of healthcare benefits) on contract terms negotiated between parties to labor agreements. The Court reached this conclusion by noting, among other things, that it made no sense to infer that Congress intended the NLRA to deprive states of the ability to take such action when Congress itself passed similar federal laws applying to unionized employers and employees.

union organizing activities; nor do such activities constitute an area Congress intended to be free from all regulation. Accordingly, AB 1889 is not preempted under *Machinists*.

B. Garmon *Preemption*

Garmon preemption arises when there is an actual or potential conflict between state regulation and federal labor law due to state regulation of activity that is actually or arguably protected or prohibited by the NLRA. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." *Garmon*, 359 U.S. at 244, 79 S.Ct. 773. Nonetheless,

> [w]hile the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine ··· does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected.

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 188, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978).

1. *Actually protected or prohibited*

Section 7 of the NLRA is entitled "Right of employees as to organization, collective bargaining, etc." 29 U.S.C. § 157. It identifies areas of protected employee conduct and can be fairly characterized as setting forth those employee practices that are actually protected by the NLRA. Section 8, conversely, is entitled "Unfair labor practices." 29 U.S.C. § 158. By its plain terms, it sets forth activities that are actually prohibited by the NLRA. It is easy to see how both section 7 and section 8 can be implicated in a *Garmon* preemption analysis: if a state regulates employee activities

that are actually protected under section 7, or activities of either employers or labor unions that are actually prohibited under section 8, that regulation will be preempted unless it falls within an exception to *Garmon*. *See* 359 U.S. at 243-44, 79 S.Ct. 773.

Section 8(c) prohibits sanctioning employers under the NLRA for engaging in an unfair labor practice when they exercise speech rights that are guaranteed by the First Amendment.[13] This subsection can be termed the "free speech exemption" to section 8's delineation of unfair labor practices, because it carves out noncoercive speech from the category of actually punishable activity. Notwithstanding the dissent's mistaken insistence to the contrary, section 8(c) does not *grant* employers speech rights. (Dissent at 1107.) Rather, it simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969) (stating that section 8(c) "merely implements the First Amendment"); *Hotel Employees, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 n. 9 (9th Cir.1992) ("[S]ection 8(c) merely states an employer does not commit an unfair labor practice by expressing its views regarding unionization."); *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 364-65 (D.C.Cir.2003) ("Fitting a *Garmon* claim under the language of § 8(c) is awkward . . . . [T]he activities described in § 8(c) . . . are not 'protected *by*' the NLRA, except from the NLRA itself."); *see also Fiber Indus., Inc.*, 267 N.L.R.B.

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[13] Entitled "Expression of views without threat of reprisal or force or promise of benefit," § 8(c) provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

840, 841 (1983) ("[I]t is well settled that Sec. 8(c) applies only to unfair labor practice proceedings.").

The Chamber of Commerce and dissent argue, however, that to say an activity is not punishable by the NLRA is to protect that activity. Because AB 1889's restrictions on grant and program funds purportedly affect an employer's ability to speak against unionization, the Chamber of Commerce and dissent urge, the statute improperly intrudes on the employer's implied (yet somehow actually explicit in section 8(c)) NLRA speech right-as distinct from its separate First Amendment rights-and is therefore preempted under *Garmon*.

We reject this peculiar proposition. The Chamber of Commerce and dissent cite no authority to support it, and the NLRB itself makes no such claim as to section 8(c)'s supposed affirmative grant of speech rights. *See NLRB Amicus Brief* at 4, 21-26 (echoing interpretation of NLRA in cases quoted above, and noting section 8(c)'s "exemption" for non-coercive speech). Rather, some activities in labor relations are neither protected nor prohibited by the NLRA and are therefore not preempted under *Garmon*. *See, e.g., NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 492-95 & n. 23, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960) (finding unpersuasive the argument that because certain union activities were unprotected under section 7, those activities should also be deemed unfair labor practices under section 8, and stating that "[t]here is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law").[14] If this were

[14] *See also UAW-Labor Employment & Training Corp.*, 325 F.3d at 363-64 ("The dissent makes a similar error when it suggests that the order is preempted because it conflicts with the 'regulatory scheme' the Board has established. This would be a sound analysis under 'field' preemption, but *Garmon* works differently, operating only as to activities arguably

not the case, *Machinists* preemption would cease to exist, for *Machinists* addresses "activity that [i]s neither arguably protected against employer interference by § 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act." *Metropolitan Life,* 471 U.S. at 749, 105 S.Ct. 2380.

California's refusal to subsidize employer speech for or against unionization does not regulate an activity that is actually protected or actually prohibited by the NLRA. It does not interfere with, much less govern, "the same partisan employer speech that Congress committed to the jurisdiction of the NLRB." (Dissent at 1107.) Nor does it infringe employers' First Amendment rights, because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state grant and program funds. *See infra* pp. 1095-1097; *see also Regan v. Taxation with Representation,* 461 U.S. 540, 549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *Rust,* 500 U.S. at 193, 200, 111 S.Ct. 1759; *Cammarano v. United States,* 358 U.S. 498, 513, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959).

2. *Arguably protected or prohibited*

In *Sears,* the Supreme Court refined its *Garmon* preemption doctrine in the context of an employer's common law trespass suit against picketing union members where the picketing was "arguably-but not definitely-prohibited or protected by federal law." 436 U.S. at 182, 98 S.Ct. 1745. *Sears* divided the inquiry into two related but distinct

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protected or prohibited, *not* to ones simply left alone, even if left alone deliberately." (internal citations omitted)).

questions: whether the state court's jurisdiction over the trespassing claim was pre-empted (1) by the arguably prohibited nature of the picketing, or (2) by its arguably protected nature.[15]

As to whether the union's picketing was arguably prohibited by the NLRA, *Sears* articulated a relatively straightforward "primary jurisdiction" test: if the claim considered by the state tribunal is identical to one that could be presented to the NLRB, the state's jurisdiction is preempted. *Id.* at 197, 201, 98 S.Ct. 1745; *see also Belknap, Inc. v. Hale,* 463 U.S. 491, 511-12, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983) (applying primary jurisdiction test to state regulation of arguably prohibited conduct). As to whether the picketing was arguably protected by the NLRA, the Court went beyond the primary jurisdiction test to address additional federal supremacy concerns: chiefly,

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[15] The dissent argues that we err in considering whether AB 1889 is pre-empted by interfering unduly with an arguably protected or prohibited activity because, in the dissent's idiosyncratic and incorrect view, the real cause of *Garmon* preemption is AB 1889's alleged interference with actually protected conduct-the speech rights purportedly granted under § 8(c). (Dissent at 1109.) Insofar as the dissent suggests we apply *Sears* to avoid addressing whether AB 1889 is preempted by interfering with an actually protected activity (Dissent at 1108), its claim ignores our express repudiation of that argument in Section II.B.1 *supra.* To the extent the dissent contends we err in even analyzing whether AB 1889 interferes with arguably protected or prohibited conduct (*id.* at 1108, 1109), it neglects the Chamber of Commerce's own contention that the statute does so, and fails to recognize that such analysis is orthodox in *Garmon* analysis. *See, e.g., Local 926, Int'l Union of Operating Eng'rs v. Jones,* 460 U.S. 669, 676, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983) ("Our approach to the pre-emption issue has thus been stated and restated. First, we determine whether the conduct that the State seeks to regulate or to make the basis of liability is actually *or arguably* protected or prohibited by the NLRA. Although the *Garmon* guidelines [are not to be applied] in a literal, mechanical fashion, if the conduct at issue is *arguably* prohibited or protected otherwise applicable state law and procedures are ordinarily pre-empted." (internal quotation marks and citations omitted) (alteration in original) (emphasis added)).

whether preemption was warranted-despite the lack of identity between issues the state court and NLRB might consider-to protect against the "risk of misinterpretation of [the NLRA] and the consequent prohibition of protected conduct." *Sears*, 436 U.S. at 203, 98 S.Ct. 1745. We employed this "primary jurisdiction plus" approach in *Radcliffe v. Rainbow Construction Co.*, 254 F.3d 772, 786 (9th Cir.2001), where we held that state jurisdiction over claims by union members against an employer for false arrest, false imprisonment and malicious prosecution were not preempted under *Garmon*.[16]

Here, the parties do not dispute that the NLRB has no interest in resolving the central controversy that a state court would have to resolve in enforcing AB 1889, namely, whether state funds were used to "assist, promote, or deter union organizing." Far from being the same as a question the NLRB might consider, a suit under the California statute would entail accounting only for the employer's possible use of state funds.

The Chamber of Commerce, however, argues that a state court enforcing AB 1889 would in some instances need to determine whether a union was a "labor organization" under section 16647, an area that it claims is reserved to the NLRB under *Marine Engineers Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 178, 82 S.Ct. 1237, 8 L.Ed.2d 418 (1962). But even if the state court had to make such a determination, it would be relevant only to the ultimate question of whether an employer spent state grant or program funds to assist, promote or deter organizing, not to whether the employer's advocacy violated the NLRA. We have previously rejected an argument that the incidental determination by a state court of whether persons were engaged "in lawful union activity"

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[16] In *Radcliffe*, defendants argued that "the validity of the plaintiffs' claims ··· turns on whether the union activities carried on by the plaintiffs were ··· protected by § 7 of the NLRA." 254 F.3d at 785.

was sufficient to occasion *Garmon* pre-emption, where the focus of the state proceeding was on "state concerns of accommodating such union activity with the state-law rights of private property." *Radcliffe*, 254 F.3d at 786. Moreover, AB 1889 is not comparable to the Minnesota statute at issue in *Marine Engineers*, under which a state law determination that certain groups were not labor organizations permitted the state court to regulate picketing and other activities identical to those that could have been raised before the NLRB. *Marine Eng'rs*, 370 U.S. at 176, 82 S.Ct. 1237.

The Chamber of Commerce also argues that because AB 1889 restricts an employer's ability to use state funds to "influence" its employees, *see* § 16645(a), California courts would effectively be deciding whether employers had improperly acted under section 8(a) of the NLRA to "restrain [ ] or coerce employees in the exercise of the rights guaranteed in [section 7 of the NLRA]." 29 U.S.C. § 158(a)(1) (NLRA § 8(a)). However, were the NLRB to consider an unfair labor practice charge arising from the employer's conduct, it would focus on whether the employer had interfered with the employees' section 7 rights, regardless of whether the employer used state funds in the process. In contrast, under AB 1889, the California court would determine only whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA. Because the statute focuses solely on the *use* of state funds, there is no identity of claims, and the primary jurisdiction test is not met.[17]

We next assess whether the state statute is preempted because Congress would "prefer[ ] the costs inherent in a jurisdictional hiatus to the frustration of national labor policy

[17] There is no merit to the Chamber of Commerce's claim that the California statute provides an additional remedy for NLRA violations. The statute's damages provisions are intended to remedy the misuse of state funds under the statute, regardless of whether any NLRA violation has occurred.

which might accompany the exercise of state jurisdiction." *Sears*, 436 U.S. at 203, 98 S.Ct. 1745. For essentially the same reasons explained in the primary jurisdiction analysis, there is no risk that a state court applying AB 1889 could "misinterpret[] . . . federal law." *Id.* Not only is there no identity of claims, but the subject matter of an AB 1889 suit is so far removed from the NLRA's primary focus-the determination of what constitutes an unfair labor practice-that any rationale for *Garmon* preemption is absent.

Sears itself is instructive. In that case, after noting the state interest in hearing trespass claims, the Court identified a clear potential overlap between the NLRB's jurisdiction and that of the state court.

> [T]he state court was obligated to decide[whether] the trespass was not actually protected by federal law, a determination which might entail an accommodation of Sears' property rights and the Union's § 7 rights. In an unfair labor practice proceeding initiated by the Union, the Board might have been required to make the same accommodation.

Id. at 201, 98 S.Ct. 1745. The Court further stated that the trespass at issue was arguably protected by the NLRA, whereas previously recognized exceptions to *Garmon* preemption did not "involve[ ] protected conduct." *Id.* at 204, 98 S.Ct. 1745. Nevertheless, the Court held that the risk that a state's regulation of trespass might impermissibly trench upon the NLRB's jurisdiction over the speech rights of union members was too unlikely to justify usurpation of the state's prerogative. There was no "significant risk of prohibition of protected conduct," so the Court was "unwilling to presume that Congress intended the arguably protected character of the [regulated] conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action." *Id.* at 207, 98 S.Ct. 1745.

In contrast to *Sears*, there is no potential overlap between the NLRB's jurisdiction and that of a state court hearing a

suit brought under AB 1889. However, even if there were some risk of overlap, California has as important and legitimate a sovereign interest in determining how the recipients of state grant and program funds use those funds as it does in entertaining trespass actions. Thus, even if AB 1889 had some peripheral and incidental effect on the arguably protected advocacy rights of employers, given the nature and mechanics of the statute (which has no concern for whether the speech at issue is protected by the NLRA, but focuses only on the source of the money funding the speech), there is no "significant risk of prohibition of protected conduct." *Id.* California's interest is so strong that we cannot presume that Congress intended the arguably protected character of the [regulated] conduct to deprive" the state of the ability to control the use of its fisc in this modest manner. *Id.*

The Supreme Court has cautioned that "inflexible application of [the *Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Bhd. of Carpenters,* 430 U.S. 290, 302, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). Our "balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation," *Id.* at 300, 97 S.Ct. 1056, ensures that we avoid preempting state regulation of conduct that involves "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we [cannot] infer that Congress ha[s] deprived the States of the power to act," or where "the activity regulated [is] a merely peripheral concern" of the NLRA. *Garmon,* 359 U.S. at 243-44, 79 S.Ct. 773; *see also Belknap,* 463 U.S. at 498, 103 S.Ct. 3172. The previously recognized exceptions to *Garmon* preemption have involved exercises of state court jurisdiction over universally recognized common law torts, rather than, as here, the

limited exercise of a state's spending power. *See, e.g., Linn,* 383 U.S. at 62, 86 S.Ct. 657 ("[A] State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility'" that it is not preempted despite arguably overlapping NLRB jurisdiction over the speech at issue.) (quoting *Garmon,* 359 U.S. at 244, 79 S.Ct. 773). But the logic that compelled the Supreme Court to recognize the exception for certain torts applies just as powerfully, if not more so, to a state's effort to ensure that those who accept its grant and program funds use them for the purpose for which they were given.[18]

In this sense, a state's control of its purse strings is of at least as great a concern to the state as its power to regulate defamatory speech, violence, trespass, obstruction of access to property or the intentional infliction of emotional distress.[19] Just as the state has a responsibility to protect its citizenry from such torts, so it has a responsibility and a right to spend its treasure-largely generated from the pockets of its citizens-based on principles and guidelines that its democratically elected legislature deems to be appropriate. Such spending decisions are, of course, subject to federal supremacy concerns. But the Supreme Court has commanded us to be extremely cautious before concluding that a federal regulatory scheme intrudes upon so fundamental a state prerogative. "Whatever risk of an

[18] For instance, suppose California granted money to hospitals to create more nurse positions and did not want the effectiveness of its grants diminished by funding a campaign to convince nurses not to unionize. So long as the hospitals remained free to lobby nurses with their own monies, California would be well within its rights to insist that its grants be used for the purpose for which they were given-the creation of needed nursing positions.

[19] *See Linn,* 383 U.S. at 63-64, 86 S.Ct. 657; *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131, 139-40, 78 S.Ct. 206, 2 L.Ed.2d 151 (1957); *Sears,* 436 U.S. at 207, 98 S.Ct. 1745; *Int'l Union, United Auto. Workers of America (UAW-CIO) v. Russell,* 356 U.S. 634, 644-46, 78 S.Ct. 932, 2 L.Ed.2d 1030 (1958); *Farmer,* 430 U.S. at 302-06, 97 S.Ct. 1056.

erroneous state-court adjudication does exist is outweighed by the anomalous consequence of a rule" that would deny the state the ability to control its fisc in the circumstances presented here. *Sears,* 436 U.S. at 206, 98 S.Ct. 1745. In an era of tight budgets, where many important and competing interests vie for every dollar of a state's treasury, it is all the more important that states retain their right to control the allocation of their scarce resources. Thus, even if AB 1889's restriction on the use of state grant and program funds intruded on an activity arguably protected or arguably prohibited by the NLRA-and we hold that it does not-*Garmon's* recognized exception would save the California statute from preemption. *See Garmon,* 359 U.S. at 243-44, 79 S.Ct. 773.

III. First Amendment

Although we elsewhere discuss why AB 1889 does not infringe the First Amendment rights of grant and program fund recipients, *see supra* pp. 1087-1089, 1092, we elaborate on our reasoning here in response to the dissent's contention to the contrary based largely on its erroneous premise that AB 1889 compels "employers themselves to take a position of neutrality with respect to labor relations." (Dissent at 1099.) As we explained in Section II.A., *supra* p. 1087, the California statute does not impose any condition on the *receipt* of state grant and program funds. Because an employer retains the freedom to raise and spend its own funds however it wishes-so long as it does not *use* state grant and program funds on union-related advocacy-AB 1889 does not infringe employers' First Amendment right to express whatever view they wish on organizing.[20]

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[20] For instance, California agreed during oral argument that nothing in AB 1889 prevents a closed corporation that receives 100% of its revenues from the state from using its *own* funds to assist, promote or deter organizing, where the corporation receives those funds as a capital contribution by a shareholder who reinvested a legitimately distributed

Accordingly, AB 1889's effect on speech is properly considered in light of *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). In *Rust*, the Court held that "[b]y requiring that the . . . grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities." *Id.* at 198, 111 S.Ct. 1759. In short, a restriction on the use of government funds for an activity does not compel cessation of the activity.

Here, California has not "denied" employers the "right to engage in [union]-related activity," but has "merely refused to fund such activities out of the public fisc." *Id.* This conclusion follows from the Court's familiar observation about what is regulation and what is not. "[A] legislature's decision not to subsidize the exercise of a . . . right does not infringe the right." *Regan*, 461 U.S. at 546, 549, 103 S.Ct. 1997 (rejecting the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State"); *see also Lyng v. Int'l Union, UAW*, 485 U.S. 360, 368-69, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988). The legislature can "insist [ ] that public funds be spent for the purposes for which they [a]re authorized," even if doing so forbids the use of government funds for other speech. *Rust*, 500 U.S. at 196, 111 S.Ct. 1759; *see also United States v. Am. Library Ass'n*, 539 U.S. 194, 212, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003). California, in enacting AB 1889, has simply availed itself of that prerogative.[21]

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corporate dividend-itself the fruit of the receipt of state grant or program funds.

[21] The dissent questions the legitimacy of AB 1889 because the statute was "sponsored by the California Labor Federation, AFL-CIO, and supported by a phalanx of labor unions." (Dissent at 1102.) Not only is this an irrelevant consideration, but it also is not up to us as judges to

Nor is there any merit to the dissent's assertion that AB 1889 violates employers' First Amendment Rights by "irrevocably stamp[ing] dollar bills with 'Property of California' " and "limit[ing] the items an employer may purchase with these specific dollar bills." (Dissent at 1099.) The dissent's parade of horribles goes far beyond the scope of plaintiffs' facial challenge to sections 16645.2 and 16645.7 and the record before us. The district court made no findings, nor is there evidence, that AB 1889 "co-opts the payment for goods and services and profit realized under a contract." (Dissent at 1098.)[22] Consistent with *Rust,* the California statute, like various federal acts, requires only that those who accept government grant and program funds use them for the purpose for which they were given. Our construction of AB 1889 is "readily apparent," *Gooding v. Wilson,* 405 U.S. 518, 521, 92 S.Ct. 1103, 31 L.Ed.2d 408

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impugn the California legislature's motives. As the Seventh Circuit wisely observed in *Lavin*

> If (as seems likely) Illinois has taken the approach in this law because state officials want to assist organized labor as well as the farmers who supply the grain to be made into ethanol and the owners of ethanol plants, that is neither a surprise nor a reason for invalidity. Most legislation is the product of coalitions among interest groups. Boston wanted to clean up its harbor, but there can be little doubt that it also wanted to shower benefits on workers who were the incumbents' political supporters. . . . *Federal preemption doctrine evaluates what legislation does, not why legislators voted for it or what political coalition led to its enactment.* This statute does not affect people who spurn the state's largesse.

431 F.3d at 1007 (emphasis added).

[22] As noted previously, *supra* note 1, the only issue before us is whether AB 1889's grant and program fund restrictions, § 16645.2 and § 16645.7, are preempted by the NLRA or are constitutionally invalid. The statute's restriction on the use of *contract* funds, § 16645.4, is not at issue nor was it addressed by the district court, and the dissent errs in implying otherwise. (Dissent at 1098-1100.)

(1972) (internal quotation marks and citation omitted), but even were it not, the statute is not "overly broad and unconstitutional" (Dissent at 1100) because its restrictions on the use of grant and program funds have been "carefully drawn" to mirror the mechanics of constitutionally sound federal acts. *Gooding*, 405 U.S. at 522, 92 S.Ct. 1103; *see also Regan*, 461 U.S. at 549-50, 103 S.Ct. 1997.

It is even more implausible that AB 1889's restrictions on grant and program funds "alter [the funds'] use as legal tender" and frustrate the "basic tenets of our economic system." (Dissent at 1098, 1099) Again, the statute's text is precisely modeled on language the Congress itself has used. The Workforce Investment Act, for example, regulates federal funds given to state boards to be awarded as " *grants or contracts*, on a competitive basis, to eligible providers within the State or outlying area to enable the eligible providers to develop, implement, and improve adult education or literacy activities within the State." 20 U.S.C. § 9241(a) (emphasis added). The Workforce Investment Act also requires "[e]ach recipient of funds . . . [to] provide . . . assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C. § 2931(b)(7). AB 1889's exactly analogous requirement can hardly be antithetical to the monetary concept of free tender.[23]

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[23] The dissent also disregards the nature of state programs, which are run to serve public purposes and need not guarantee a profit to private companies. (Dissent at 1100.) For instance, in the MediCal program, which the Chamber of Commerce itself discusses in the context of nursing homes that are "entirely dependent on state funds," state funding is designed only to cover the costs of services performed. Notably, allowable costs under MediCal are also based on federal Medicare cost reporting standards, which provide that "[i]n determining such reasonable costs, costs incurred for *activities directly related to influencing employees respecting unionization may not be included*." 42 U.S.C. § 1395x(v)(1)(N) (emphasis added).

CONCLUSION

Because sections 16645.2 and 16645.7 of AB 1889 are not preempted under either *Machinists* or *Garmon* and do not on their face infringe plaintiffs' First Amendment rights, the judgment of the district court is **REVERSED** and its injunction is **VACATED**. We remand for further proceedings consistent with this opinion.

BEEZER, Circuit Judge, with whom KLEINFELD and CALLAHAN, Circuit Judges, join in dissent:

May a state leverage its spending power to induce an employer to adopt a neutral policy toward labor union organizing? The First Amendment, the National Labor Relations Act ("NLRA" or "the Act"), and well-established doctrines of preemption, demand an answer in the negative.

By extending the definition of "state funds" to include any monies received by a private employer as a result of contracting with the state, AB 1889 strikes at the heart of the First Amendment. AB 1889 prohibits not just the use of state money granted to an employer for and under a specific program but also co-opts the payment for goods and services and profit realized under a contract (undoubtedly not state funds). AB 1889's gag rules prevent any employer from spending its own funds in direct violation of the First Amendment.

The NLRA extends to employees the opportunity to render a free and informed choice about union representation. In doing so, the Act allows for robust debate of union representation issues by employers and employees alike. California Assembly Bill 1889, codified at Cal. Govt.Code § 16645-49, ("AB 1889" or "the statute"), stifles employers from fully participating in organizing and exercising the rights that are explicitly granted to them by Congress under the NLRA. The statute rides roughshod over the delicate balance established by Congress between labor

unions and employers. In addition, the California statute interferes with the NLRA's extension of exclusive jurisdiction to the National Labor Relations Board ("NLRB") for the adoption and enforcement of representation election rules. I would hold the federal preemption of the relevant provisions of the California statute to be complete.

I

AB 1889 is far from a neutral enactment that simply restricts use of undefined "state funds." It abrogates the First Amendment rights of employers to speak out and discuss union organizing campaigns. Under the guise of preserving state neutrality, the statute operates to impel employers themselves to take a position of neutrality with respect to labor relations, in direct conflict with employers' rights under the First Amendment.

AB 1889 applies to any vendor of goods or services who receives payouts from the State of California "in excess of ten thousand dollars in any calendar year on account of its participation in a state program." "State program" is not defined in the statute and this broad language brings under the auspices of the statute every purveyor of goods or services unlucky enough to cross the magic $10,000 threshold in its annual contracting with the state.[24] AB 1889's speech regulations and presumption that "state funds" have been spent on union-related expenditures allows the state to irrevocably stamp dollar bills with "Property of California," alter their use as legal tender and limit the items

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[24] The term contracting may suggest a more narrow application than that intended by AB 1889. AB 1889, as written, takes a programmatic approach to controlling the labor-management arena through its extensive reach to all businesses who have a financial involvement in state regulated activities. For example, hospitals or nursing homes that accept MediCal patients (a state program) are likely to receive over $10,000 in payments from California. The acceptance of these state payments subjects those payments and that vendor to the strictures of AB 1889.

an employer may purchase with those specific dollar bills. All this, despite the fact that the employer has fully performed under a contract and the state has received every item it is entitled to under the terms of the contract. AB 1889 writes a neutrality provision into every contract the state enters into without requiring the state to bargain or pay for such a pricey concession. The statute also fails to state where an employer may turn to recover any compliance costs that a labor organization may recover in a suit authorized by the Act-another unbargained for benefit gained by the state.

A statutory blanket prohibition on employers advocating for or against unions would blatantly violate the First Amendment as the state has no legitimate interest in prohibiting employers from speaking on union issues. Even the opinion of the court recognizes that the statute only passes constitutional muster if it is read to only apply to state funds. Opinion of the Court at 11794 ("Nor does it interfere with employers' exercise of their First Amendment rights, because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state funds."). Just because the majority closes it eyes and wishes it were so cannot alter the economic fact that AB 1889 both explicitly and implicitly does unconstitutionally require neutrality as a condition for contracting with the state. A state could not terminate a contract due to the contractor's speech, nor could it decide not to contract based on the employer's speech as either decision would violate the employer's First Amendment Rights. *Board of County Comm'rs, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (Government cannot retaliate against independent contractors for exercising First Amendment Rights).

Once the state has chosen to award a contract to the lowest responsible bidder, the state's interest in the funds it pays for the contracted goods and services is at end. It has made a bargain for the provision of a limited set of benefits and the

vendor has agreed to provide those goods and services, including labor, in exchange for money. Once the exchange has been made and payment has been received, that money can no longer be considered "state funds." The state has no interest in how those funds are spent by the vendor and the state has no 11810 right or reason to limit an individual who engages in a labor dispute from using its own money for any lawful purpose. Upon payment to the employer those funds became free tender and any attempt by the state to undermine the buying power of free tender by limiting the types of goods that can be purchased with funds in which the state is not vested with a residual interest is fundamentally opposed to the basic tenants of our economic system and the First Amendment.

Every reasonable employer will also have built into its contract a measure of profit. This profit is the earned compensation of the employer upon completion of its contractual duties. AB 1889 seeks to condition the uses to which an employer may put these specific funds. The problems with this profit-taking are most stark when considering the case of employers who conduct all of their business with the state. These employers can offer their employees bonuses, pay for all-inclusive vacations to Tahiti, throw extravagant parties with champagne and caviar, or simply bank their profits to save for a rainy day. What they cannot do, according to AB 1889, is hold a mandatory meeting to discuss unionization (either the benefits or burdens) with their employees. Employers who receive all of their revenue from the state have no other option but to cease all union-related speech. The opinion of the court has no mercy for these employers as it concludes that they have made their own bed through their "free-market choice." Simply because a business or individual chooses to contract with the state, or even accept employment from the state, does not mean that the state may abrogate First Amendment rights. *See, e.g. United States v. National Treasury Employees Union,* 513 U.S. 454, 115 S.Ct. 1003, 130

L.Ed.2d 964 (1995). Free market choice or not, these employers retain their First Amendment right to spend their own funds, as they undoubtedly earn by contracting with the state, as they see fit.

Because AB 1889 commandeers private employers own funds, in addition to regulating the use of state funds, I would hold that the statute is overly broad and unconstitutional under the First Amendment.

II

The NLRA is a comprehensive scheme designed to balance the rights and interests of both employers and employees and provides an administrative mechanism to resolve questions concerning union representation. Recognizing the extreme importance of the free flow of information, the NLRA explicitly protects rights of employers to express their views on union organizing efforts. The opinion of the court recognizes the importance of unrestricted speech and the free flow of information to the proper enactment of the Act but blithely and naively concludes that the California statute does not impede the flow of information to employees by regulating employers' speech. It ignores the application of AB 1889 to employers own funds, the intensely burdensome and one-sided regulatory scheme and the actual impact of the statute as amply demonstrated in the record.

A.

Congress' intent to protect the free-flow of information between employers and employees is embodied in Section 8(c) of the Act, which permits employers to articulate, in a non-coercive manner, their views regarding union organizing efforts:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of

this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). Congress added Section 8(c) of the NLRA in 1947, "to insure both to employers and labor organizations full freedom to express their views to employees on labor matters. . . ." S. Rep. 80-105, at 23 (1947). Indeed, the explicit purpose of Section 8(c) was "to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." H.R.Rep. No. 80-510 (1947), *reprinted in* 1947 U.S.Code Cong. Serv. 1135, 1151.

The United States Supreme Court recognizes that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers, Local 114,* 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The Court also holds that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). The Congressional enactment of Secion 8(c), the Court explains, in conjunction with the First Amendment, allows employers to express "any of [their] general views about unionism or any of [their] specific views about a particular union" in a non-coercive manner. *Id.* at 618, 89 S.Ct. 1918.

Our case law has also consistently emphasized the importance of an employer's freedom of speech in labor relations matters. "Freedom of speech is an essential component of the labor-management relationship. Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in 'uninhibited, robust, and wide-open' debate." *Steam Press Holdings v. Haw. Teamsters & Allied Workers Union, Local 996,* 302 F.3d 998, 1009 (9th Cir.2002) (quoting *New York Times v.*

Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). For a concise and accurate statement of the rule, we adopted the principle of free speech in union representation matters as crafted by the Fifth Circuit:

> The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available.

NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 760 (9th Cir.1967) (quoting *Southwire Co. v. NLRB,* 383 F.2d 235, 241 (5th Cir.1967)).

Our opinions have faithfully reiterated a "commit[ment] to the principle that debate in union campaigns should be vigorous and uninhibited," so long as the debate is free of coercion and retaliatory threats. *NLRB v. Lenkurt Elec. Co.,* 438 F.2d 1102, 1108 (citing *NLRB v. TRW-Semiconductors, Inc.,* 385 F.2d 753, 759-60 (9th Cir.1967)). "The exercise of free speech in these campaigns should not be unduly restricted by narrow construction. It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right." *Id.; accord, Montgomery Ward & Co. v. NLRB,* 385 F.2d 760, 763 (8th Cir.1967) ("[T]he right of free speech guaranteed by the First Amendment and § 8(c) of the Act should not be defeated by narrow or strained construction.").

This protection of the speech of both employees and employers is the heart of Congress' design to protect and enhance union organizing. The NLRB supports this congressional policy of free speech, holding "that it will not restrict the right of any party to inform employees of the advantages and disadvantages of unions and of joining them as long as such information is imparted to employees in a noncoercive manner." *Trent Tube Co.,* 147 NLRB 538, 541

(1964) (internal quotation marks omitted); *see also United Technologies Corp.*, 274 NLRB 1069, 1074 (1985) ("[A]n employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations." (footnote omitted)).

B.

AB 1889 prohibits grantees and private employers from using funds received from the state "to assist, promote, or deter union organizing," which is defined to include "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization . . . or [w]hether to become a member of any labor organization." Cal. Gov't Code § 16645(a), 16645.2(a), 16645.7(a). The prohibited expenditures include the payments by an employer for legal and consulting fees relating to union organizing efforts as well as the salaries of supervisors and employees related in any respect to union organizing efforts. § 16646. The statute exempts several types of pro-union activities and expenses from the prohibition, including "[a]ddressing a grievance or negotiating or administering a collective bargaining agreement" and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." § 16647(a), (d).

The statute entails burdensome and detailed record-keeping. The statute requires that employers and grantees certify in advance that the state funds will not be used for speech and activities that are related to union organizing. § 16645.2(c), 16645.7(b). In addition, employers and grantees must maintain detailed records showing that none of the funds have been used for speech regarding labor relations. § 16645.2(c), 16645.7(c). Those records must be made available to the Attorney General upon request. *Id.* The statute presumes that, where funds are commingled,

state funds were used to assist, promote, or deter union organizing. § 16646(b).

The enforcement provisions place heavy burdens on affected employers. The statute renders employers and grantees liable for treble damages (i.e., the amount of state funds that were expended in violation of the statute, plus a civil penalty equal to twice the amount of those funds). § 16445.2(d), 16445.7(d). The Attorney General of California, or any private taxpayer, may file a lawsuit against a suspected violator "for injunctive relief, damages, civil penalties, and other appropriate equitable relief." § 16645.8(a). The statute awards a prevailing plaintiff, or certain prevailing taxpayer intervenors, attorney's fees and costs. § 16645.8(d). The statute does not award any attorney's fees or costs to a prevailing employer. By creating seemingly impossible compliance burdens, by means of onerous accounting requirements and the threat of lawsuits, the statute essentially mandates employer neutrality. The statute effectively halts employer campaigns to defeat labor organizing activity or even an employer's ability to offer an opinion on the merits of one union versus another. Similar to neutrality agreements, which are often sought by unions from employers, the California statute pushes employers to a policy of neutrality, which in turn helps facilitate union organizing. It is no surprise that the California statute was sponsored by the California Labor Federation, AFL-CIO, and supported by a phalanx of labor unions. Sen. Comm. on Industrial Relations, Comm. Rep. for 1999 Cal. Assemb. B. No. 1889, 1999-00 Reg. Sess., at 1 (June 28, 2000). Equally telling, a law firm which represented itself as "the largest Union-side labor law firm on the West Coast" wrote in a letter to the California Attorney General that AB 1889, if not halted by a court, would "have a significant positive effect on various [union] organization drives. . . ."

The statute carries a false air of evenhandedness. It purports to limit employers from using state funds to either

"promote" union organizing or "deter" union organizing. § 16645.2(a), 16645.7(a). What must be understood, of course, is that few, if any, employers will wish for their employees to vote for union representation. Rare, indeed, will the circumstance be where an employer will actually dedicate resources to encourage its employees to unionize. The California Teamsters revealed the true impact of the legislation in a letter to certain members of the California legislature when AB 1889 was under consideration. The California Teamsters Public Affairs Council "urged [an] 'aye' vote on AB 1889" because it "prohibit[s] employers who receive state funds from using those funds to *discourage* unionization" and will affect the "all too common practice" of "employer campaigns to defeat labor organizing activity." (emphasis added).

The compliance provisions are daunting. Employers must maintain records demonstrating a complete separation of state funds. These records must identify every expense at all related to a union organizing campaign, save for a few pro-union exceptions, and prove conclusively that such expenses do not derive from state funds. § 16645.2(c), 16445.7(c), 16646, 16647. The statute creates a presumption that the employer used state funds for unionization purposes unless proven otherwise. § 16646(b). This presumption applies even when an employer has sufficient private funds such that no state funds were actually expended. *Id.* . The statute's documentation demands, which require employers to track every moment of employee time and every expense that somehow relates to deterring union organizing efforts, operate to inhibit employers from opposing union representation drives at all.

To comply with the statute and continue to oppose unionization or speak out on the merits of one union versus another, an employer must create and maintain two completely separate accounting and payroll systems. This becomes necessary because the California statute requires the employer to monitor public and private funds and ensure

that the statute's mandate of fund separation is fulfilled. In addition, the statute requires the employer to engage in the virtually impossible task of allocating every single employer expense related to union organizing activity, including supervisor time and employee time, which must be meticulously logged and tracked.

The record before us shows that labor unions have leveraged the significant compliance burdens of the statute to enhance their bargaining position as against employers. After AB 1889 passed, unions began writing to the California Attorney General's office, alleging violations of the statute in an effort to coerce employers to abstain from distributing literature, retaining consultants and legal counsel, or otherwise communicating with employees about the advantages and disadvantages of employment in a union shop. One union wrote the Attorney General and alleged that an employer violated the statute because employees who were attending a mandatory meeting about union organizing were not paid with a separate paycheck for time that each employee spent at the meeting. Another union alleged a violation of the statute, with little factual support, but offered to "settle" the alleged violation if the employer agreed to enter into a neutrality agreement with the union. Yet another union alleged that an employer violated AB 1889 by hiring an attorney to represent it during an organizing drive without arranging to pay for these legal services from funds that were conclusively derived from a source other than the state. The attempts by the AFL-CIO, in briefs filed in this appeal, to downplay the decidedly pro-union impact of AB 1889 are belied by the record before the court. What that record teaches is that the unions' have and will aggressively use AB 1889 to gain a special advantage in labor disputes and thereby alter the balance of power between unions and employers.

In light of these burdens and this record it cannot be said with a straight face that the statute "does not affect an employer's ability to use its own funds in connection with

union organizing activity." Opinion of the Court at 1090. The significant and undeniable impact AB 1889 has on employers' speech rights means that not only does it violate the First Amendment, but it is undoubtedly preempted by the NLRA.

III

The Supreme Court's preemption doctrines as they relate to the NLRA have long been centered around reinforcing the "purpose of the Act[, which] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' "*NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971) (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed. 228 (1953)). The Court has articulated "two distinct NLRA pre-emption principles" as expressed in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) ("*Garmon* preemption"), and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (" *Machinists* preemption"). *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748, 748-49, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985).

I would hold that the preemption doctrines established in *Garmon* and *Machinists* completely preempt the relevant provisions of the California statute.

A.

The doctrine of "*Machinists* pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Bldg. & Trades Council v. Associated Builders ("Boston Harbor")*, 507 U.S. 218, 226, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (internal quotation marks omitted). Although cast nominally as an effort to ensure state neutrality, the California statute, by stifling speech rights of

employers and their ability to participate in a debate about the value of unions generally or advise employees as to which union is preferable, operates to significantly empower labor unions as against employers. In doing so, the statute destroys the delicate balance between labor unions and employers as mandated by Congress through the NLRA. For this initial reason, AB 1889 is preempted by the NLRA, pursuant to *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

Machinists preemption "is based on the premise that 'the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining,'" which means that "neither a state nor the National Labor Relations Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful.'" *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir.1996) (quoting *Machinists*, 427 U.S. at 144, 149, 96 S.Ct. 2548).

Under the doctrine of *Machinists* preemption, a state cannot "deny[ ] one party . . . a weapon that Congress meant him to have available," because such a state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Machinists*, 427 U.S. at 150, 151, 96 S.Ct. 2548 (internal quotation marks omitted). Employers have a number of tools at their disposal in exercising their Section 8(c) rights to express their views on union organizing efforts. An employer is permitted, for example, to express its views about union representation to masses of employees, in mandatory meetings, on company time, so long as such speech does not occur within 24 hours of an election. *See Peerless Plywood Co.*, 107 NLRB 427, 429 (1953); *Livingston Shirt Corp.*, 107 NLRB 400, 409 (1953). Employers may dispatch supervisors to engage in one-on-one discussions during work time with employees about the negative effects of union representation, *see, e.g., Lenkurt*

Elec. Co., 438 F.2d at 1107-08, and may disseminate written anti-union materials, *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 336 (1998) (holding that "the [e]mployer did not engage in objectionable conduct when its supervisors handed out flyers [even] at a time when the [e]mployer was enforcing its otherwise valid no-distribution rule against employees").

A state law that both explicitly targets and directly regulates processes controlled by the NLRA is preempted under the *Machinists* doctrine. Because AB 1889, on its face, directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process using the statutorily protected self-help mechanisms, it interferes with an area Congress intended to leave free of state regulation. The statute hands a coercive weapon to those seeking to unionize by creating an ever present threat of consuming and expensive litigation should an employer deign to offer its opinion on the merits of unionization. The statute ties the hands of management financially and allows pro-union groups free reign.[25]

Preemption will prevail over the application of local law even when federal law does not expressly protect the conduct at issue if "the application of state law . . . would operate to

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[25] I note an additional manner in which AB 1889 alters the balance as established between labor unions and employers: AB 1889 comes dangerously close to rendering employers' financial records an open book, which federal labor law does not allow. Labor unions are permitted to receive employers' financial records under the NLRA only after winning an election and only for legitimate collective bargaining purposes. *See NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967). Under AB 1889, however, unions are able to bypass these federal limits and file lawsuits in state court, granting them access to employers' financial records in state court. With these records in hand, the unions would have additional leverage in advocating for a unionized workforce and place additional pressure on an employer to simply recognize a given union.

frustrate the purpose of the federal legislation." *Teamsters v. Morton,* 377 U.S. 252, 258, 260, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964) (noting also that a conflicting state law cannot be permitted to "frustrate the congressional determination to leave th[e] weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy"). *Machinists* affirms this notion, holding that "a particular activity might be protected by federal law not only when it [is explicitly protected by the NLRA], but also when it was an activity that Congress intended to be unrestricted by [a]ny governmental power to regulate." 427 U.S. at 141, 96 S.Ct. 2548 (internal quotation marks omitted).

An overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization. *See NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45, 57 S.Ct. 615, 81 L.Ed. 893 (1937) ("The theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel."). The NLRA's declared purpose is to "restor[e] equality of bargaining power" by, among other ways, "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." 29 U.S.C. § 151.

By impeding the flow of information and any substantive discussion of unionization, the statute substantively regulates and disrupts "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks omitted). The statute frustrates "effective implementation of the [NLRA's] processes," rendering pre-emption of the California statute

under *Machinists* appropriate. *Machinists*, 427 U.S. at 148, 96 S.Ct. 2548 (internal quotation marks omitted).

That California purports to act through its spending power rather than its regulatory power, is a "distinction without a difference." *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 287, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). "[W]e cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration,' under the NLRA as long as they did so through exercises of the spending power." *Id.* at 290, 106 S.Ct. 1057 (quoting *Garmon*, 359 U.S. at 243, 79 S.Ct. 773) (citation omitted). Although a state's ability to control the use of its funds is an important state interest, regulation that specifically targets and substantially affects the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds. *See Metropolitan Milwaukee Assn. of Commerce v. Milwaukee County*, 431 F.3d 277, 278-79 (7th Cir.2005).

B.

The doctrine of *Garmon* preemption exists to uphold national labor policy and to vindicate Congress' decision to "entrust[ ] administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242, 246, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). The California statute stifles employers' speech rights which are granted by federal law, and in doing so, impedes the ability of the NLRB to uphold its election speech rules and administer free and fair elections. I would hold that AB 1889 is also preempted under the *Garmon* doctrine.

In upholding the NLRA from state-law dilution, the Supreme Court has emphasized the importance of "delimiting areas of conduct which must be free from state

regulation if national policy is to be left unhampered." *Garmon*, 359 U.S. at 246, 79 S.Ct. 773. *Garmon* preemption is focused on avoiding "the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes." *Id.* at 242, 79 S.Ct. 773.

There are two distinct circumstances under which *Garmon* preemption can emerge. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 187, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). The first preempts activity which is *actually* protected or prohibited by federal law, dictating that "[w]hen it is clear 11823 or may fairly be assumed that the activities which a State purports to regulate are protected [by the NLRA], due regard for the federal enactment requires that state jurisdiction must yield." *Garmon*, 359 U.S. at 244, 79 S.Ct. 773. The second form of *Garmon* preemption deals with activities that are merely either *arguably* protected or *arguably* prohibited by the Act. *Sears*, 436 U.S. at 187-88, 98 S.Ct. 1745. This second and distinct application of *Garmon* preemption holds that "[w]hen an activity is *arguably* subject [to the Act], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245, 79 S.Ct. 773 (emphasis added).

The first branch of the *Garmon* preemption doctrine is at issue, and preempts AB 1889. Congress' intent, the Supreme Court and Ninth Circuit precedent all lead inextricably to the conclusion that Section 8(c) of the NLRA *actually* grants and protects speech rights of employers. *See supra* § I. Because the Act is a comprehensive regulatory scheme, to say that an activity is not punishable by the Act is the equivalent of protecting that activity. AB 1889 encumbers these speech rights, and in doing so, interferes with the jurisdiction of the NLRB. Congress has directed the

NLRB to oversee elections and determine what conduct constitutes an unfair labor practice under the Act. *See* 29 U.S.C. § 158(a)(1). Broadly speaking, and consistent with Section 8(c) of the NLRA, the NLRB takes a *laissez faire* approach to employee and employer speech, allowing passionate, partisan debate to proceed during a union organizing campaign. *See Trent Tube Co.*, 147 NLRB 538, 541 (1964). At the same time, the NLRB has jurisdiction to regulate a certain bandwidth of employer speech, to ensure compliance with Section 8(c). *See Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982) ("[W]e will no[t] probe into the truth or falsity of the parties' campaign statements, and [ ] will not set elections aside on the basis of misleading campaign statements···· [But] we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice."). For example, the NLRB has long enforced various "time, place, and manner" rules that bar certain types of campaign and speech activities in the vicinity of the polls or in the final hours before an election. *See Peerless Plywood Co.*, 107 NLRB at 429-30; *Milchem, Inc.*, 170 NLRB 362, 362-63 (1968). The NLRB has held that, consistent with Section 8(c), employers may hold mandatory meetings with employees about union organizing efforts, *Livingston Shirt Corp.*, 107 NLRB at 409, direct supervisors to informally discuss a representation campaign with employees, *see Stanley Oil Co.*, 213 NLRB 219, 225 (1974), and distribute anti-union literature to employees even when enforcing a no-solicitation rule to employees, *Beverly Enterprises-Hawaii*, 326 NLRB at 336.

The California statute regulates the same partisan employer speech that Congress committed to the jurisdiction of the NLRB. In doing so, AB 1889 discourages employer speech, which works at cross-purposes with the relaxed election speech rules established by the NLRB. Congress "entrusted [to the NLRB] . . . a wide degree of discretion in establishing the procedure and safeguards necessary to insure

the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322 (1946). By discouraging employer speech, California directly usurps the ability of the NLRB to administer elections that will foster fair and free employee choice.

Far from hewing to the NLRA's goal of installing a "national labor policy of minimizing industrial strife," *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975), AB 1889 encourages additional litigation by allowing unions and the California Attorney General to bring proceedings in state court to attack the very partisan employer speech that the NLRB protects. California defies Congress' decision to "entrust[ ] to the Board alone" the criteria necessary to conduct a fair representation election. *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226, 60 S.Ct. 493, 84 L.Ed. 704 (1940).

"*Garmon* preemption is 'intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.'" *Alameda Newspapers*, 95 F.3d at 1412 (quoting *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986)); *see also Gould*, 475 U.S. at 286-89, 106 S.Ct. 1057. California's displacement of the NLRA's free speech protections and its interference with the NLRB render AB 1889 preempted under *Garmon*. *Garmon* preemption applies because AB 1889 "regulate[s] conduct so plainly within the central aim of federal regulation [that it] involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law," thus creating a "potential frustration of national purposes." *Garmon*, 359 U.S. at 244, 79 S.Ct. 773.

The opinion of the court avoids general *Garmon* preemption principles and replaces them with an overly narrow

view of the *Garmon* doctrine that is inapplicable to this dispute. The critical error of the opinion of the court lies in a misreading of *Sears, Roebuck & Company,* 436 U.S. 180, 98 S.Ct. 1745, and a misunderstanding of the form of *Garmon* preemption that applies to AB 1889.

The opinion of the court relies upon *Sears* for the proposition that *Garmon* preemption applies only when the controversy presented to the state court is identical to the controversy that would be presented to the NLRB. The opinion of the court fails to recognize, however, that this requirement of identicalness applies only to the type of *Garmon* preemption applied to those activities that are merely *arguably prohibited* by the Act. Because of heightened concerns rooted in the Supremacy Clause of the United States Constitution, the requirement of identicalness does not apply if the activity is either *arguably protected* or, as here, *actually* protected, by the Act. An analysis of *Sears* readily uncovers the misconception of the *Garmon* doctrine as expressed in the court's opinion filed today.

At issue in *Sears* was the power of a state court to hear a trespass lawsuit brought by an employer to enforce trespassing laws against union picketing. *Sears,* 436 U.S. at 182, 98 S.Ct. 1745. The Court first considered whether the picketing was " *arguably prohibited* " by federal law, which would be possible grounds for preemption. *Id.* at 190-98, 98 S.Ct. 1745 (emphasis added). The Court concluded that, with regard to activity which is arguably prohibited by the Act, *Garmon* preemption (and the accompanying risk of interference with the jurisdiction of the NLRB) emerges only when "the controversy is identical to . . . that which could have been, but was not, presented to the Labor Board." *Id.* at 197, 98 S.Ct. 1745. The Court concluded that the NLRB's inquiry regarding the arguably prohibited conduct would prove to be vastly different than an inquiry by the state court as to whether there was a trespass, and therefore, declined to find *Garmon* preemption.

The Court then turned to the question whether the *arguably protected* character of the union's picketing could lead to *Garmon* preemption. *Id.* at 199-207, 98 S.Ct. 1745. Preliminarily, the Court noted that "state-court interference with conduct actually protected by the act" invokes a "constitutional objection" rooted in the Supremacy Clause. *Id.* at 199, 98 S.Ct. 1745. Therefore, "[c]onsiderations of federal supremacy . . . are implicated to a greater extent when labor-related activity is protected than when it is prohibited." *Id.* at 200, 98 S.Ct. 1745. The Court concluded that even though the Union's peaceful, if trespassory, picketing could arguably be protected under the Act, such a trespass "is far more likely to be unprotected than protected." *Sears,* 436 U.S. at 205, 98 S.Ct. 1745. Therefore, the Court held, "the assertion of state jurisdiction [to adjudicate the alleged trespass] does not create a significant risk of prohibition of protected conduct." *Sears,* 436 U.S. at 207, 98 S.Ct. 1745. Notably, with regard to the *arguably protected* conduct of the picketing and trespass, the Court did *not* require (as it did with respect to *arguably prohibited* conduct) that the controversies before the NLRB and state court be identical before invoking *Garmon* preemption.

As this analysis of *Sears* indicates, the rule that *Garmon* preemption applies only when the state court and NLRB inquiries are identical only applies to activity which is *arguably prohibited* under the Act. With regard to conduct that is *arguably protected* under the Act, the standard under which preemption is found becomes less stringent because of heightened federal supremacy concerns. Accordingly, as compared to activity which is merely arguably prohibited by the Act, *Garmon* preemption is more readily found in relation to activity which is *arguably protected* or *actually protected* by the Act. 436 U.S. at 199-200, 98 S.Ct. 1745.

At issue with regard to AB 1889 is not a mere arguable prohibition or arguable protection granted by the NLRA. Rather, Section 8(c) of the NLRA constitutes an *explicit,*

actual protection which explicitly protects the speech rights of employers.

All along, the *Sears* Court explicitly disclosed that it was *not* addressing a case that involved *actually protected* conduct. *Sears*, 436 U.S. at 187, 98 S.Ct. 1745 ("The case is not, however, one in which 'it is clear or may fairly be assumed' that the subject matter which the state court sought to regulate . . . is either prohibited or protected by the Federal Act."). In light of the explicit speech protections granted by Section 8(c) of the NLRA, the *Sears* test of strict identicalness does not apply to a *Garmon* preemption analysis of AB 1889. Simply put, the opinion of the court's reliance on *Sears*, and its application of the test of identicalness between the NLRB's inquiry and the state court's inquiry, is misplaced.

The traditional *Garmon* analysis applies to the explicitly protected free speech rights of employers, and because AB 1889 interferes with those rights and undermines the speech rules and election procedures of the NLRB, I would hold that AB 1889 is preempted under *Garmon*.

IV

I must respectfully dissent because AB 1889 violates the First Amendment and is preempted under both *Machinists* and *Garmon*. The District Court properly entered summary judgment in favor of plaintiffs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

No. 03-55169

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC

CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

and

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants-Appellants.

Appeal from the United States District Court for the Central District of California Gary L. Taylor, District Judge, Presiding.

Filed September 6, 2005.

Before: BEEZER and FISHER, , Circuit Judges, and ENGLAND,* District Judge.

Opinion by Judge BEEZER,; Dissent by Judge FISHER..

BEEZER, Circuit Judge:

The National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq., extends to employees the opportunity to render a free and informed choice about union representation. In

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* The Honorable Morrison C. England, United States District Judge for the Eastern District of California, sitting by designation.

doing so, the Act allows for robust debate of union representation issues by employers and employees alike. The question presented is whether California Assembly Bill 1889, codified at Cal. Govt. Code § 15545-49, ("AB 1889" or "the statute"), which bars employers from spending "state funds" on union-related speech, is preempted by the National Labor Relations Act.[1]

As we explain, the California statute chills employers from exercising their free speech rights that are explicitly protected by Congress under the National Labor Relations Act. In doing so, the statute undermines the delicate balance established by Congress as between labor unions and employers. In addition, the California statute interferes with the National Labor Relations Act's extension of exclusive jurisdiction to the National Labor Relations Board ("NLRB") for the adoption and enforcement of representation election rules.

Appellants California and the AFL-CIO vigorously defend the statute, arguing that California may spend its funds in a manner that it sees fit. The Supreme Court teaches, however, that the use of the state spending power is rarely a defense to state interference with the National Labor Relations Act. *Wisconsin Dep't of Indus., Labor, and Human Relations v. Gould,* 475 U.S. 282, 290, 290-91, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986) (emphasizing that Congress would not have intended to allow states to interfere with the NLRA "as

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[1] At issue in this appeal are all provisions of AB 1889, except for sections 16645.1, 16645.3, 16645.4, 16645.5, and 16645.6, which deal with state contractors and public employers. These sections are not at issue because the district court held that plaintiffs lacked standing to challenge these provisions, except for § 16645.5. *See Chamber of Commerce v. Lockyer,* 225 F.Supp.2d 1199, 1202-03 (C.D.Cal.2002). The parties further stipulated, and the district court agreed, that summary judgment as to § 16645.5 be denied without prejudice and that the plaintiffs' challenges to sections 16645.1, 16645.3, 16645.4, 16645.5, and 16645.6 be stayed.

long as they did so through exercises of the spending power"). The California statute is regulatory in nature, and is not focused on the police power, state procurement concerns, or local economic needs. Implementation by means of the state spending power does not save AB 1889 from preemption.

We previously filed an opinion in this case, which we withdrew upon granting appellants' Petition for Panel Rehearing. *Chamber of Commerce v. Lockyer,* 364 F.3d 1154 (9th Cir.2004), *reh'g granted and withdrawn,* 408 F.3d 590 (9th Cir.2005). Today, we decide the matter anew, and we affirm the district court's holding[2] that the National Labor Relations Act preempts AB 1889.

I

Before addressing employers' speech rights and embarking upon a preemption analysis, we introduce and analyze the California statute at issue.

A

Section 16645.2(a) of the California statute prohibits a "recipient of a grant of state funds" from "us[ing] the funds to assist, promote, or deter union organizing." Similarly, section 16645.7(a) bars private employers who receive more than ten thousand dollars of state funds in a calendar year from "us[ing] any of those funds to assist, promote, or deter union organizing."

The statute defines "assist[ing], promot[ing], or deter[ring] union organizing" as "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . or [w]hether to

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[2] We review the district court's preemption analysis and grant of summary judgment de novo. *Bank of Am. v. City & County of San Francisco,* 309 F.3d 551, 557 (9th Cir.2002).

become a member of any labor organization." Cal. Gov't Code § 16645(a). The statute prohibits *"any expense,* including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." § 16646(a) (emphasis added). The statute exempts several types of pro-union activities and expenses from the prohibition, including "[a]ddressing a grievance or negotiating or administering a collective bargaining agreement," "[a]llowing a labor organization or its representatives access to the employer's facilities or property," and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." § 16647(a), (b), (d).

The statute requires burdensome and detailed record-keeping. Employers and grantees must maintain detailed records showing that none of the funds have been used for speech regarding labor relations. § 16645.2(c), 16645.7(c). Those records must be produced for inspection by the Attorney General upon request. *Id.* The statute presumes that, where state and non-state funds are commingled, state funds were used to assist, promote, or deter union organizing. § 16646(b). The plaintiffs aptly characterize this feature as the "commingling trap," because a mere technical failure to keep records can constitute a violation even when no state funds were actually expended. The statute requires that employers and grantees certify in advance that the state funds will not be used for speech and activities that are related to union organizing. § 16645.2(c), 16645.7(b).

The enforcement provisions place heavy burdens on affected employers who accept state funds. The statute renders employers and grantees liable for treble damages (i.e., the amount of state funds that were expended in violation of the statute, plus a civil penalty equal to twice the amount of those funds). § 16645.2(d), 16645.7(d).

The Attorney General of California, or any private taxpayer, may file a lawsuit against a suspected violator "for injunctive relief, damages, civil penalties, and other appropriate equitable relief." § 16645.8(a). The statute awards a prevailing plaintiff, and certain prevailing taxpayer intervenors, attorney's fees and costs. § 16645.8(d). The statute does not provide for the award of any attorney's fees or costs to a prevailing employer or grantee.

B

We conclude that the California statute, which is far from the neutral enactment that appellants contend it to be, significantly undermines the speech rights of employers related to union organizing campaigns. Under the guise of preserving state neutrality, the statute operates to impel employers themselves to take a position of neutrality with respect to labor relations, in direct conflict with employers' rights as granted by the National Labor Relations Act.

By creating exacting compliance burdens, strict accounting requirements, the threat of lawsuits, and onerous penalties, the statute chills employer speech on the merits of unionism. The potential costs of litigation, plus the threat of severe penalties threaten to effectively halt employer campaigns to defeat labor organizing activity. Similar to neutrality agreements, which are often sought by unions from employers, the California statute pushes employers to a policy of neutrality, which in turn helps facilitate union organizing. And the statute's grant of a private right of action raises the specter that unions will file suits not to recover on claims for allegedly misspent funds, but rather to obtain bargaining leverage in a labor dispute.[3] The California statute was sponsored by the California Labor Federation, AFL-CIO, and supported by a number of labor

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[3] As it turns out, lawsuits and the threat thereof for unions to obtain leverage in a union organizing dispute is not a mere theoretical possibility. *See* Part I.C, *infra*.

organizations. Sen. Comm. on Industrial Relations, Comm. Rep. for 1999 Cal. Assemb. B. No. 1889, 1999-00 Reg. Sess., at 1 (June 28, 2000).[4]

The statute carries a false air of evenhandedness. It purports to limit employers from using state funds to either "promote" union organizing or "deter" union organizing. § 16645.2(a), 16645.7(a). What must be understood, of course, is that few, if any, employers will wish for their employees to vote for union representation. Rare, indeed, will the circumstance be where an employer will actually dedicate resources to encourage its employees to unionize. For this reason, the statute's prohibition on spending state funds to "assist" or "promote" union organizing is meaningless, particularly when taking into account the pro-union exceptions contained in section 16647. Hence, the overriding primary effect of the statute is focused and one-sided: to prevent the expenditure of money which seeks to "deter union organizing."

The California Teamsters telegraphed this impact of the legislation in a letter to certain members of the California legislature when AB 1889 was under consideration. The California Teamsters Public Affairs Council "urged [an] 'aye' vote on AB 1889" because it "prohibit[s] employers who receive state funds from using those funds to *discourage* unionization" and will affect the "all too common practice" of "employer campaigns to defeat labor organizing activity." (emphasis added). In addition, a law firm which represented itself as "the largest Union-side labor law firm on the West Coast" wrote in a letter to the California Attorney General that AB 1889, if not halted by a court, would "have a

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[4] The Chamber of Commerce argues that the California statute is "part of a state-by-state effort to de facto rewrite the NLRA." The State of New York was recently enjoined from enforcing a statute which is similar to AB 1889. *See Healthcare Ass'n of New York State, Inc. v. Pataki*, No. 1:03-CV-0413, 388 F.Supp.2d 6, 2005 WL 1155687 (N.D.N.Y. May 17, 2005).

significant positive effect on various [union] organizing drives . . . ."

The compliance provisions are daunting. Employers must maintain records demonstrating a complete separation of state funds. These records must identify every expense at all related to a union organizing campaign, save for a few pro-union exceptions, and prove conclusively that expenditures for such purposes do not derive from state funds. § 16645.2(c), 16645.7(c), 16646, 16647. The statute creates a presumption that the employer used state funds for a prohibited purpose unless proven otherwise. § 16646(b). This presumption applies even when an employer has sufficient private funds such that no state funds were actually expended. *Id.*

The documentation demands of the statute, which require employers to track every moment of employee time and every expense that somehow relates to deterring union organizing efforts, operate to inhibit employers from opposing union representation drives at all. *See* Cal. Gov't Code § 16646(a) (requiring documentation of *"any expense,* including . . . salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to . . . deter union organizing") (emphasis added). To comply with the statute and continue to exercise its free speech rights, an employer would be required to create accurate and expensive accounting and payroll systems which identify, isolate, and allocate every expenditure, no matter how small, related to assisting, promoting, or deterring union organizing. The statute's "commingling trap" ensures that a failure to allocate an expenditure correctly leads to a presumption that state funds were expended for a prohibited purpose. Unions have capitalized on these strict record-keeping provisions, threatening and sometimes taking legal action based on (often unsupported) allegations that employers have not kept

adequate records demonstrating a separation of state funds. *See* Part I.C, *infra.*

Unions are authorized to commence lawsuits or to intervene in a lawsuit demanding an audit, injunctive relief, damages, and civil penalties. § 16645.8(a). With the benefit of the statute and the civil discovery process, unions are able to file a suit to pursue a fishing expedition or otherwise distract an employer during union organizing.[5] The statute allows for treble damages, which further chills employer speech by creating a further disincentive to even attempt to present any adverse comment on union organizing activity in the first instance. § 16645.2(d), 16645.7(d).

AB 1889 might be most problematic with regard to employers and grantees who receive 100% of their revenues from the state. If AB 1889 were in effect, those employers would have no ability whatsoever to exercise their federal statutory rights to communicate their views about a union organizing effort.

Not only does the statute muster California's public funds to regulate labor relations, but it also commandeers employers' *own* money and dictates to these private employers how they shall spend their money. Private money

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[5] In this connection, we note an additional manner in which AB 1889 alters the balance as established by Congress between labor unions and employers: AB 1889 comes dangerously close to rendering employers' financial records an open book, which federal labor law does not allow. Labor unions are permitted to receive employers' financial records under the National Labor Relations Act only after winning an election and only for legitimate collective bargaining purposes. *See NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967); *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153, 76 S.Ct. 753, 100 L.Ed. 1027 (1956). Under AB 1889, however, unions are able to bypass these federal limits and file lawsuits in state court, granting them access to employers' financial records in state court. With these records in hand, the unions would have additional leverage in advocating for a unionized workforce and place additional pressure on an employer to simply recognize a given union.

comes into play because when a state pays an employer for goods or services, there is an amount of profit subsumed within the payment. That profit is no longer the state's money, but is ultimately transformed into the earned compensation of the employer. The California statute prohibits an employer from using even this profit to discuss the advantages and disadvantages of union organizing efforts with employees. The same difficulty with the interplay of private funds emerges with the statute's presumption that state funds have been spent on union-related expenditures, even when an employer has a commingled account with sufficient private funds so that no public money need be actually spent.[6]

C

The substantial record before us demonstrates that labor unions have leveraged the significant compliance burdens of the statute to enhance their bargaining position as against employers. After AB 1889 passed, unions began writing to the California Attorney General's office, alleging violations of the statute in an effort to coerce employers to abstain from distributing anti-union literature, retaining consultants and legal counsel, or otherwise communicating with employees about the advantages and disadvantages of employment in a union shop.

The record before us contains numerous threatening complaints that labor unions have sent to employers and the California Attorney General. One union wrote the Attorney General and alleged that an employer violated the statute by illegally commingling state funds. The basis for the

[6] The statute would not be saved from preemption even if it did not commandeer an employer's own funds, because our decision is rooted in the statute's leverage of state funds to regulate labor relations in a manner that interferes with, and therefore is preempted by, federal law. The statute's command over an employer's own funds constitutes an independent problem with AB 1889, a problem upon which our holding does not rest.

allegation? That employees who were attending a mandatory meeting about union organizing were not paid with a separate paycheck for time that each employee spent at the meeting. Another union alleged a violation of the statute, with little factual support, but offered to "settle" the alleged violation if the employer agreed to enter into a neutrality agreement with the union. Yet another union alleged that an employer violated AB 1889 by hiring an attorney to represent it during an organizing drive without arranging to pay for these legal services from funds that were conclusively derived from a source other than the state.

Several lawsuits have also been filed against employers pursuant to AB 1889. In one lawsuit the California Attorney General sued Fountain View, Inc. a nursing home operator, demanding that Fountain View turn over records to demonstrate that no state funds were used in conveying its views on union organizing efforts. For good measure, the California Attorney General also demanded that the nursing home pay "attorneys' fees and costs" related to the suit.

In a different case, the Service Employees International Union, Local 399 ("Service Union"), took a very aggressive approach, deciding to sue the employer itself, AB Crispino & Company ("Crispino"), a company which also operates nursing home facilities. At the time, the Service Union was a member union of the AFL-CIO and was represented by the same legal counsel who represent appellant-intervenor AFL-CIO before us in this appeal. The Service Union alleged that the nursing home "unlawfully has used State funds to deter union organizing by its employees, and unlawfully has failed to maintain records sufficient to show that State funds were not so misused." It was not just the use of state funds that the Union alleged as a basis for the suit, but also that Crispino "co-mingled State funds and non-State funds in common accounts" and "failed to maintain records sufficient to show that it had used no State funds" with regard to the union organizing efforts. The Service Union suit further charged that the alleged violation of AB 1889 constitutes a

per se violation of California Business and Professions Code § 17200, as an "unlawful or unfair business act or practice." The lawsuit demanded a number of remedies, including an injunction, an accounting of Crispino's expenses, treble damages, and restitution, together with "attorneys' fees, investigative expenses, and costs of suit." Appellant-Intervenor AFL-CIO is hardly in a position to downplay the merit of the suit against Crispino under AB 1889, because the Service Union was then affiliated with the AFL-CIO, and some of the same lawyers that represent the AFL-CIO on appeal before us filed the suit against Crispino.

The activities of the Service Employees International Union reveal that they continued to press employers who receive California government funds to unionize or else face penalties under AB 1889. One of the same lawyers who represents the AFL-CIO before us and the Service Union against Crispino, also represented Service Union, Local 250 against The Ensign Group, which operates at least one nursing home in California, referred to as the Sonoma Healthcare Center. The lawyer, representing the union, wrote to the California Attorney General, alleging that the union believed that the Ensign Group violated AB 1889 by "fail[ing] to maintain records sufficient to show that no state funds were used for its anti-union activities" and by conducting the anti-union activities from accounts where state funds were commingled. If the Ensign Group could not present adequate evidence to disprove his allegations, the attorney "request[ed] that [the Attorney General] commence a civil action against Sonoma under Section 16645.8 for injunctive relief, damages, civil penalties, and other appropriate equitable relief."

The Ensign Group, faced with the prospect of a lawsuit from either the union or the Attorney General because of the favorable status AB 1889 affords union interests, responded that the union's "accusation of improper use of State funds at Sonoma Healthcare is reckless and without factual basis." General Counsel for the Ensign Group noted his "surprise[ ]

that [the union's attorney] would suggest that his client's stated but unsupported belief in these spurious allegations should be sufficient to mobilize and expend the resources of the Attorney General's Office and the State of California in this manner." What the record actually teaches is that the unions' aggressive use of AB 1889 to gain a special advantage in labor disputes, and thereby alter the balance of power between unions and employers, is no surprise at all. That the unions' use of AB 1889 has been effected by appellants themselves and their legal representatives-the State of California in the Fountain View case, and the AFL-CIO and its own lawyers in the lawsuit against Crispino and the threatened lawsuit against The Ensign Group-undermines their arguments, made in these proceedings on appeal, that downplay the decidedly pro-union impact of the California statute.

II

Our preemption analysis begins with the National Labor Relations Act, which protects the rights of employers and employees and provides an administrative mechanism to resolve questions concerning union representation. We hold that Section 8(c) of the National Labor Relations Act, codified at 29 U.S.C. § 158(c), explicitly protects the right of employers to express their views about unions and union organizing efforts.

A

Section 8(c), codified at 29 U.S.C. § 158(c), permits employers to articulate, in a non-coercive[7] manner, their views regarding union organizing efforts:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of

[7] For simplicity, we refer to speech that "contains no threat of reprisal or force or promise of benefit," 29 U.S.C. § 158(c), as "non-coercive."

this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c).

Although the National Labor Relations Act was originally enacted in 1935, Congress added Section 8(c) of the NLRA in 1947, "to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." H.R.Rep. No. 80-510 (1947), *reprinted in* 1947 U.S.Code Cong. Serv. 1135, 1151. The purpose of Section 8(c) was "to insure both to employers and labor organizations full freedom to express their views to employees on labor matters . . . ." S. Rep. 80-105, at 23 (1947).

The National Labor Relations Act is a comprehensive regulatory scheme governing labor relations. *See, e.g., Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969). The Act's preeminent mode of regulation operates by defining a series of prohibitions on employer and union conduct, called "unfair labor practices." *See* 29 U.S.C. § 158(a) (defining unfair labor practices if committed by employers); 29 U.S.C. § 158(b) (defining unfair labor practices if committed labor organizations). An actor who is alleged to have committed an unfair labor practice may be subject to a Board proceeding and if found to have committed an unfair labor practice, the Board may impose various remedies. *See* 29 U.S.C. § 160.

Because the Act is a comprehensive regulatory scheme, to say that an activity is *not punishable* by the Act, which is what Section 8(c) dictates, is the equivalent of protecting that activity. Section 8(c) specifically precludes non-coercive employer speech from constituting as an unfair labor practice, or even evidence thereof. In other words, because the Act's comprehensive scheme declares non-coercive employer speech to be non-punishable, employers are free to

engage in it. Non-coercive employer speech is thus protected by the Act's comprehensive regulatory scheme.

The United States Supreme Court recognizes that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers, Local 114,* 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). Accordingly, a state defamation statute was partially preempted by the NLRA, to "guard[ ] against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act." *Id.* at 65, 86 S.Ct. 657. The Court reiterates that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). The Congressional enactment of § 8(c), the Court explains, in conjunction with the First Amendment, allows employers to express "any of [their] general views about unionism or any of [their] specific views about a particular union" in a non-coercive manner. *Id.* at 618, 89 S.Ct. 1918.

We turn to discuss the longstanding importance of employer free speech to the National Labor Relations Act, which reinforces our holding that Section 8(c) of the Act protects non-coercive employer speech.

B

Although there are certain limits on employer speech-such as speech that is coercive or threatening-the National Labor Relations Act pivots on the notion that employers and employees may freely discuss their views about union organizing efforts.

The National Labor Relations Board has supported the congressional policy of free speech, holding "that it will not restrict the right of any party to inform employees of the advantages and disadvantages of unions and of joining them as long as such information is imparted to employees in a

noncoercive manner." *Trent Tube Co.*, 147 NLRB 538, 541 (1964) (internal quotation marks omitted); *see also United Technologies Corp.*, 274 NLRB 1069, 1074 (1985) ("[A]n employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations.") (footnote omitted).

Employers have a number of tools at their disposal in exercising their Section 8(c) rights to express their views on union organizing efforts. An employer is permitted, for example, to express its views about union representation to masses of employees, in mandatory meetings, on company time, so long as such speech does not occur within 24 hours of an election. *See Peerless Plywood Co.*, 107 NLRB 427, 429 (1953); *Livingston Shirt Corp.*, 107 NLRB 400, 409 (1953). Employers may dispatch supervisors to engage in one-on-one discussions during work time with employees about the negative effects of union representation, *see, e.g., NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1107-08 (9th Cir.1971), and may disseminate written anti-union materials, *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 336 (1998) (holding that "the [e]mployer did not engage in objectionable conduct when its supervisors handed out flyers [even] at a time when the [e]mployer was enforcing its otherwise valid no-distribution rule against employees.").

Our opinions have faithfully reiterated our "commit[ment] to the principle that debate in union campaigns should be vigorous and uninhibited," so long as the debate is free of coercion and retaliatory threats. *Lenkurt Elec.*, 438 F.2d at 1108 (citing *N.L.R.B. v. TRW-Semiconductors, Inc.*, 385 F.2d 753, 759-60 (9th Cir.1967)). "The exercise of free speech in these campaigns should not be unduly restricted by narrow construction. It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right." *Id.; accord, Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763 (8th Cir.1967)

("[T]he right of free speech guaranteed by the First Amendment and § 8(c) of the Act should not be defeated by narrow or strained construction.").

Much like modern political campaigns, union organizing campaigns are fiercely contested, but the National Labor Relations Board "has allowed wide latitude to the competing parties. It is clear that the Board does not police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements." *Linn,* 383 U.S. at 60, 86 S.Ct. 657 (internal quotation marks and footnote omitted); *see also Midland Nat'l Life Ins. Co.,* 263 NLRB 127, 133 (1982) ("[W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements."); *NLRB v. Yellow Transp. Co.,* 709 F.2d 1342, 1343 (9th Cir.1983) (recognizing *Midland).*

We have consistently emphasized the importance of an employer's freedom of speech in labor relations matters. "Freedom of speech is an essential component of the labor-management relationship. Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in 'uninhibited, robust, and wide-open' debate." *Steam Press Holdings v. Haw. Teamsters & Allied Workers Union, Local 996,* 302 F.3d 998, 1009 (9th Cir.2002) (quoting *New York Times v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). For a concise and accurate statement of the rule, we have adopted the principle of free speech in union representation matters as crafted by the Fifth Circuit:

> The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of

> information, the good and the bad, informs him as to the choices available.

NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 760 (9th Cir.1967) (quoting *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir.1967)).

C

Congress chose to explicitly protect non-coercive employer speech from punishment under the Act. The National Labor Relations Act's comprehensive scheme protects non-coercive employer speech, because it is fundamental in allowing fair and free representation elections.

We turn to discuss federal preemption principles, with a keen eye toward whether the California statute interferes with employers' federally protected free speech rights on union matters.

III

The Supreme Court's preemption doctrines as they relate to the National Labor Relations Act have long been centered around reinforcing the "purpose of the Act[, which] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971) (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed. 228 (1953)). Congressional intent is the ultimate touchstone of any preemption analysis. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (*"Metropolitan Life"*).

The Supreme Court has articulated "two distinct NLRA pre-emption principles" as expressed in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) ("*Garmon* preemption"), and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S.

132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (" *Machinists* preemption"). *Metropolitan Life*, 471 U.S. at 748, 748-49, 105 S.Ct. 2380. We analyze the doctrines in turn and hold that *Garmon* preemption and *Machinists* preemption each completely preempts the provisions of the California statute before us.

A

The doctrine of *Garmon* preemption exists to uphold national labor policy and to vindicate Congress's decision to "entrust[ ] administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Garmon*, 359 U.S. at 242, 246, 79 S.Ct. 773. The California statute stifles employers' speech rights which are granted by federal law, and in doing so, impedes the ability of the National Labor Relations Board to uphold its election speech rules and administer free and fair elections. We hold that AB 1889 is completely preempted under the *Garmon* doctrine.

In upholding the National Labor Relations Act from state-law dilution, the Supreme Court has emphasized the importance of "delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." *Garmon*, 359 U.S. at 246, 79 S.Ct. 773. *Garmon* preemption is focused on avoiding "the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes." *Id.* at 242, 79 S.Ct. 773.

There are three forms of *Garmon* preemption, depending on the status of the conduct that the state attempts to regulate: (1) where the conduct is *actually* protected or prohibited by the NLRA; (2) where the conduct is arguably prohibited by the NLRA; and (3) where the conduct is arguably protected by the NLRA. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S.

180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). Because section 8(c) actually protects employers' speech rights in the labor relations context, the first and strongest form of *Garmon* preemption applies. At issue in *Sears* was the power of a state court to hear a trespass lawsuit brought by an employer to enforce trespassing laws against union picketing. *Sears*, 436 U.S. at 182, 98 S.Ct. 1745. All along, the *Sears* Court explicitly disclosed that it was *not* addressing a case that involved *actually* protected or prohibited conduct. *Sears*, 436 U.S. at 187, 98 S.Ct. 1745 ("The case is not, however, one in which 'it is clear or may fairly be assumed' that the subject matter which the state court sought to regulate ··· is either prohibited or protected by the Federal Act.").

The *Sears* Court, assessing the second type of *Garmon* preemption, considered whether the picketing was *"arguably prohibited"* by federal law, which would be possible grounds for preemption. *Id.* at 190-98, 98 S.Ct. 1745 (emphasis added). The Court concluded that, with regard to activity which is arguably prohibited by the Act, *Garmon* preemption (and the accompanying risk of interference with the jurisdiction of the NLRB) emerges only when "the controversy is identical to ··· that which could have been, but was not, presented to the Labor Board." *Id.* at 197, 98 S.Ct. 1745. The Court concluded that the NLRB's inquiry regarding the arguably prohibited conduct would prove to be vastly different than an inquiry by the state court as to whether there was a trespass, and therefore, declined to find *Garmon* preemption.

The Court turned to the question whether the *arguably protected* character of the union's picketing could lead to *Garmon* preemption. *Id.* at 199-207, 98 S.Ct. 1745. Preliminarily, the Court noted that "state-court interference with conduct actually protected by the act" invokes a "constitutional objection" rooted in the Supremacy Clause. *Id.* at 199, 98 S.Ct. 1745. Therefore, "[c]onsiderations of federal supremacy . . . are implicated to a greater extent when labor-related activity is protected than when it is

prohibited." *Id.* at 200, 98 S.Ct. 1745. The Court concluded that even though the Union's peaceful, if trespassory, picketing could arguably be protected under the Act, such a trespass "is far more likely to be unprotected than protected." *Sears,* 436 U.S. at 205, 98 S.Ct. 1745. The Court held, "the assertion of state jurisdiction [to adjudicate the alleged trespass] does not create a significant risk of prohibition of protected conduct." *Sears,* 436 U.S. at 207, 98 S.Ct. 1745. Notably, with regard to the *arguably protected* conduct of the picketing and trespass, the Court did *not* require (as it did with respect to *arguably prohibited* conduct) that the controversies before the NLRB and state court be identical before invoking *Garmon* preemption.

The strongest form of *Garmon* preemption applies to activity which is *actually* protected or prohibited by federal law. AB 1889, in view of Section 8(c) of the NLRA and its actual protection of speech rights of employers, invokes this strongest form of *Garmon* preemption, which dictates:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [the National Labor Relations Act,] due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Garmon, 359 U.S. at 244, 79 S.Ct. 773 (quoted in *Sears,* 436 U.S. at 187, 98 S.Ct. 1745 n.11). AB 1889 encumbers federally protected speech rights, and in doing so, interferes with the jurisdiction of the National Labor Relations Board.

Congress has directed the National Labor Relations Board to oversee elections and determine what conduct constitutes an unfair labor practice under the Act. *See* 29 U.S.C. § 158(a)(1). Broadly speaking, and consistent with section 8(c) of the National Labor Relations Act, the NLRB takes a

laissez faire approach to employee and employer speech, allowing passionate, partisan debate to proceed during a union organizing campaign. *See Trent Tube Co.*, 147 NLRB 538, 541 (1964). At the same time, the NLRB has jurisdiction to regulate a certain bandwidth of employer speech, to ensure compliance with § 8(c). *See Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982) ("[W]e will no[t] probe into the truth or falsity of the parties' campaign statements, and[ ] will not set elections aside on the basis of misleading campaign statements .... [But] we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice."). For example, the NLRB has long enforced various "time, place, and manner" rules that bar certain types of campaign and speech activities in the vicinity of the polls or in the final hours before an election. *See Peerless Plywood Co.*, 107 NLRB 427, 429-30 (1953); *Milchem, Inc.*, 170 NLRB 362, 362-63 (1968). The NLRB has held that, consistent with § 8(c), employers may hold mandatory meetings with employees about union organizing efforts, *see Livingston Shirt Corp.*, 107 NLRB 400, 409 (1953), direct supervisors to informally discuss a representation campaign with employees, *see Stanley Oil Co.*, 213 NLRB 219, 225 (1974), and distribute anti-union literature to employees even when enforcing a no-solicitation rule to employees, *Beverly Enterprises-Hawaii*, 326 NLRB 335, 336 (1998).

The California statute regulates and discourages the same partisan employer speech that Congress committed to the jurisdiction of the National Labor Relations Board. In doing so, AB 1889 discourages employer speech, which works at cross-purposes with the relaxed election speech rules as established by the NLRB. It was to the NLRB that Congress "entrusted ··· a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322 (1946). By discouraging employer speech,

California directly usurps the ability of the National Labor Relations Board to administer elections that will foster fair and free employee choice.

Far from hewing to the NLRA's goal of installing a "national labor policy of minimizing industrial strife," *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975), AB 1889 encourages additional litigation by allowing unions and the California Attorney General to bring proceedings in state court to attack an employer who engages in the very partisan employer speech that the National Labor Relations Board protects.

California impairs employer speech on the merits of union organizing activity despite the NLRB's permissive policy on employer speech. California defies Congress's decision to "entrust[ ] to the Board alone" the criteria necessary to conduct a fair representation election. *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226, 60 S.Ct. 493, 84 L.Ed. 704 (1940).

We observe that " *Garmon* preemption is 'intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.'" *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1412 (9th Cir.1996) (quoting *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986)); *see also Gould*, 475 U.S. at 286-87, 288-89, 106 S.Ct. 1057 (1986). California's displacement of the NLRA's free speech protections and its interference with the National Labor Relations Board render AB 1889 preempted under *Garmon*. In other words, *Garmon* preemption applies because AB 1889 "regulate[s] conduct so plainly within the central aim of federal regulation[that it] involves too great a danger of conflict between power asserted by Congress and requirements imposed by state

law," thus creating a "potential frustration of national purposes." *Garmon,* 359 U.S. at 244, 79 S.Ct. 773.

B

The doctrine of "*Machinists* pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Bldg. and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.,* 507 U.S. 218, 226, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) ("*Boston Harbor*") (internal quotation marks omitted). Although cast nominally as an effort to ensure state neutrality, the California statute, by discouraging employers from exercising their protected speech rights, operates to significantly empower labor unions as against employers. In doing so, the California statute runs roughshod over the delicate balance between labor unions and employers as mandated by Congress through the National Labor Relations Act. For this reason, AB 1889 is preempted by the National Labor Relations Act, pursuant to *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

Machinists preemption "is based on the premise that 'the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining,' "which means that "neither a state nor the National Labor Relations Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful.'" *Alameda,* 95 F.3d at 1413 (quoting *Machinists,* 427 U.S. at 144, 149, 96 S.Ct. 2548).

Under the doctrine of *Machinists* preemption, a state cannot "deny[ ] one party . . . a weapon that Congress meant him to have available," because such a state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Machinists,* 427 U.S. at 150, 151, 96 S.Ct. 2548 (internal quotation marks omitted).

Preemption will prevail over the application of local law even when federal law does not expressly protect the conduct at issue if "the application of state law . . . would operate to frustrate the purpose of the federal legislation." *Teamsters v. Morton,* 377 U.S. 252, 258, 260, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964) (noting also that a conflicting state law cannot be permitted to "frustrate the congressional determination to leave th[e] weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy."). *Machinists* affirms this notion, holding that "a particular activity might be protected by federal law not only when it [is explicitly protected by the NLRA], but also when it was an activity that Congress intended to be unrestricted by [a]ny governmental power to regulate." 427 U.S. at 141, 96 S.Ct. 2548 (internal quotation marks omitted). We are dealing not with an activity one speculates that Congress might protect, but rather, employer speech that Congress has explicitly protected.

Drawing upon our conclusions and observations in Part I, *supra,* we conclude that AB 1889 alters the balance of power between labor unions and employers and thus falls prey to *Machinists* preemption. In infringing the speech rights of employers, the statute substantively regulates and disrupts "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks omitted). The statute frustrates "effective implementation of the [National Labor Relations] Act's processes," rendering preemption of the California statute under *Machinists* appropriate. *Machinists,* 427 U.S. at 148, 96 S.Ct. 2548 (internal quotation marks omitted). An essential structural component of the union organizing process as established by the National Labor Relations Act is the ability of management to communicate its views on the merits of unionism, an attribute that AB 1889 disrupts.

C

After we filed our first opinion, now withdrawn, appellant-intervenor AFL-CIO argued that we should consider preempting the penalty and enforcement provisions, but leave the core spending prohibition of AB 1889 intact. *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476, 116 S.Ct. 1063, 134 L.Ed.2d 115 (1996) (internal quotation marks omitted) ("In a pre-emption case such as this, state law is displaced only to the extent that it actually conflicts with federal law."). We conclude that partial preemption is not proper, because our *Garmon* and *Machinists* analyses demand preemption of AB 1889's core spending restrictions.

The AFL-CIO argues that "[t]he core restrictions on spending state funds can operate independently of the penalty and private enforcement provisions, for the Attorney General would still have authority to enforce those restrictions like any other grant or contract terms." AFL-CIO Pet. for Rehearing at 16. In other words, under the AFL-CIO's vision as to how the statute could be severed[8] and saved from preemption, employers would still be required to avoid spending state funds on union organizing, and the Attorney General alone would be able to enforce the spending restrictions.

Of course, *someone* would be empowered to enforce even the most generic requirement that state funds not be spent on discouraging union organization. This fact, along with the AFL-CIO's argument that the Attorney General would still be able to enforce the statute, actually underscores the reasoning underlying our holding that the statutory provisions at issue are completely preempted. No matter

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[8] We need not decide whether the statutory provisions of AB 1889 are severable in the first instance, because even if certain provisions of the statute are severable, none of the statutory provisions before us survives our preemption analyses.

whether the Attorney General or the unions initiate the enforcement proceedings, the balance of power as between labor unions and employers would still be improperly disturbed. Even under the limited version of AB 1889 that the AFL-CIO proposes, any time an employer who receives state funds speaks about the merits of union organizing, it would risk being accused of misspending state funds and could be subjected to an investigation by the Attorney General or a lawsuit brought by the Attorney General. And as they have already done, the unions would still be empowered to press the Attorney General to investigate alleged claims of misuse of state funds, thus further deterring employer free speech about union organizing. In addition, employers who engage in union organizing-related speech would need to maintain records showing that it did not spend state funds on such activity. This need to keep records would dissuade some employers from engaging in union-related speech at all. These substantial disincentives to employer speech of even a limited version of AB 1889 would disrupt the federally imposed balance of power between labor unions and employers and interfere with the speech rules as enforced by the National Labor Relations Board.

We also note that severing the private enforcement provisions of AB 1889 will not successfully prevent labor unions from suing, under California law, to enforce a core restriction on the use of state funds. The union in the Crispino case, for example, based a cause of action in its lawsuit that did not rely on AB 1889's private enforcement provision. The union alleged that Crispino's misuse of state funds gave the union a cause of action for injunctive relief and restitutionary relief on behalf of the State of California. The union justified the cause of action by casting the alleged misuse of funds as a per se violation of California Business and Professions Code § 17200, as an "unlawful or unfair business act or practice." *See* Cal. Bus. & Prof.Code § 17204 (authorizing a civil action for an alleged violation of

Cal. Bus. & Prof.Code § 17200 "by any person who has suffered injury in fact and has lost money or property as a result").

We emphasize that AB 1889 is a regulatory enactment and a non-neutral one at that, benefitting labor unions as against employers. The statute's total preemption in no way hinges on the statute's enforcement and penalty provisions. Even if we were to delete the private enforcement provisions, the penalty provisions, and the commingling trap, still remaining at the very least is the problematic core of the statute. The core of AB 1889 places employers who receive state funds at risk of violating state law when they attempt to express their views about union organizing. The very core of AB 1889 interferes with an employer's protected federal right to express its views on union organizing, rendering *Garmon* and *Machinists* preemption appropriate.[9]

IV

AB 1889 is a regulatory measure subject to preemption analysis and we conclude that the California statute is not saved from preemption by asserted local interests. We reject appellants' argument that the statute should be saved from preemption because California is simply attempting to control the use of its own funds.

A

California and the AFL-CIO argue that AB 1889 is not subject to preemption because the statute is not regulatory in character, but instead these parties consider the state to be a mere "market participant." *See Alameda Newspapers Inc. v.*

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[9] The substantial record before us has been generated over the course of three years of litigation. In addition to the substantial documentation that was generated before the district court, along with the district court's well-reasoned decision, we have the benefit of at least ten appellate briefs from at least five different parties, not to mention a previous opinion of our own, all of which sufficiently informs our holding that AB 1889 is preempted in its entirety. We conclude that a remand is not necessary.

City of Oakland, 95 F.3d 1406, 1413 (9th Cir.1996) ("A prerequisite to preemption [under the NLRA] is a finding that the state or local action in question constitutes *regulation* of labor relations between employers and employees."). We conclude that AB 1889 is regulatory and that the market participant exception to NLRA preemption does not apply.

Boston Harbor is the seminal case outlining the market participant exception to preemption under the National Labor Relations Act. 507 U.S. 218, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993). *Boston Harbor* holds that a state agency acted as a market participant when it required contractors working on a clean-up of the Boston Harbor to agree to the terms of a project labor agreement. The Court notes that the agency's actions were proprietary, not regulatory and explains that the agency's actions were taken with respect to this "one particular job," in an effort to "ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.* at 232, 113 S.Ct. 1190.

By contrast, *Wisconsin Department of Industry, Labor, and Human Relations v. Gould,* 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), strikes down a Wisconsin statute that barred recurring labor law violators from doing business with the state. Wisconsin argued that its statute should escape preemption because it acted through its spending power rather than its regulatory power. The Court found this to be a "distinction without a difference." *Gould,* 475 U.S. at 287, 106 S.Ct. 1057. Wisconsin was not acting as a market participant, the Court held, because Wisconsin "simply is not functioning as a private purchaser of services." *Id.* at 289, 106 S.Ct. 1057 (internal quotations omitted). The Court held the statute to be "tantamount to regulation." *Id.* at 289, 106 S.Ct. 1057. The Court explained that it "cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration' under the NLRA as long as they did so through exercises of the spending power." *Id.* at 290, 106 S.Ct. 1057 (quoting *Garmon,* 359 U.S. at 243, 79 S.Ct.

773) (citation omitted); *see also id.* (noting that because "government occupies a unique position of power in our society, [ ] its conduct, *regardless of form,* is rightly subject to special restraints") (emphasis added). Because California through AB 1889 seeks to shape the overall labor market in a pervasive, nonproprietary manner, the statute is regulatory, and far removed from the market participant exception. *See Cardinal Towing & Auto Repair, Inc. v. City of Bedford,* 180 F.3d 686, 693 (5th Cir.1999) (concluding that to establish the market participant exception, the challenged action must "essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances" and must have a "narrow scope ··· [to] defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.").

The statute applies broadly to employers and grantees who accept state funds, across countless industries, employers, and grantees. The statute is not tailored to govern in any particular setting. Further, the statute, similar to that at issue in *Gould,* is not focused on California's proprietary interest in efficiently procuring goods and services, but instead seeks to broadly color the state's impact on labor relations between employees and prospective labor union representatives. The statute sweeps broadly in impacting the labor relations of grantees and employers who enter contracts for furnishing goods or services to be paid for by the state treasury. We conclude that AB 1889 is a regulatory measure and thus does not elude NLRA preemption through the market participant exception.

B

It is for many of the same reasons that we cannot accept the AFL-CIO's argument that AB 1889 falls under the local-interest exception to *Garmon* preemption. The local-interest exception exempts from preemption state regulation of

activity that "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon,* 359 U.S. at 244, 79 S.Ct. 773. *See also Sears,* 436 U.S. at 188 n. 13, 98 S.Ct. 1745 (outlining several exceptions to *Garmon* preemption). Regulating employer speech in the labor relations context, which we hold that AB 1889 does, is not a traditional state interest, nor is it "so deeply rooted in local feeling and responsibility" as to invoke the exception.

This local-interest exception encompasses "the traditional law of torts, [ ] conduct marked by violence and imminent threats to the public order." *Garmon,* 359 U.S. at 247, 79 S.Ct. 773. The Supreme Court explained that in these instances, our system of federalism and the "compelling state interest . . . in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *Id.* The Supreme Court has also allowed states to adjudicate tort claims involving malicious libel that causes damage pursuant to this exception. *Linn,* 383 U.S. at 62, 86 S.Ct. 657.

The California statute neither addresses tort claims such as those involving libel or defamation, nor relates to violent conduct or threats to public tranquility. Appellants cite no authority demonstrating that the Supreme Court has applied this exception to *Garmon* preemption simply because the state's spending power is invoked as the tool for the state's regulation.

Appellants elevate the statute's use of state funds to talismanic status, as if the employment of state funds forgives the statute's interference with the federal National Labor Relations Act. We do not agree. The Court in *Gould* rejected precisely the argument that a state's use of its spending power is sufficient to save it from preemption. In *Gould,* the Court held that the Wisconsin statute was preempted, even though the state's spending power was at

issue. 475 U.S. at 287, 106 S.Ct. 1057. Emphasizing that Congress would not have intended to allow a state to overtake the statutory scheme of the NLRA simply because the state was using its spending power, *Gould* noted that "it is far from unusual for federal law to prohibit states from making spending decisions in ways that are permissible for private parties." *Id.* at 290, 106 S.Ct. 1057. The question of federal preemption does not ask us to "balance" state and federal interests, but rather, to determine whether Congress intended to preempt conflicting state law pursuant to the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI.; *Metropolitan Life,* 471 U.S. at 747, 105 S.Ct. 2380.

Gould holds out hope that "some state spending policies" might invoke the local interest-exception, such as those which involve "exercises of the police power" or those that can "plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." *Id.* at 291, 106 S.Ct. 1057. AB 1889 does not call into play the police power, state procurement constraints, or local economic needs. The statute is a simple, straightforward attempt to deter employers from communicating its views in labor relations matters. As such, it is not saved from preemption by the local-interest exception.

We hold that neither the market participant exception nor the local-interest exception to preemption applies.

V

California and the AFL-CIO argue that preemption should not apply because they cast the challenge to the statute as a facial, rather than an as-applied, challenge. Second, California and the AFL-CIO point to First Amendment doctrines and permissible limitations on Federal Grant Programs in arguing that the statutes should not be preempted. We address each argument in turn and conclude that none of these principles prevents preemption.

A

The AFL-CIO argues that this appeal is a facial, rather than an as-applied, challenge, and on this basis argue that plaintiffs must "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Chamber of Commerce contends that this case presents an as-applied challenge, because the question is whether the statute is invalid as to all employers covered by the NLRA. We hold that the categorical nature of NLRA preemption renders this debate (as to whether the challenge to an allegedly preempted statute is facial) an inconsequential one.

Appellants cite no NLRA preemption cases where a court has applied the *Salerno* standard. The absence of such cases is for good reason. The threshold question with regard to the doctrine of *Machinists* preemption does not address whether a state law's application to a particular set of facts is permissible, but rather, whether the state has impermissibly regulated in a zone that Congress has intended to be "free from all regulations." *Boston Harbor*, 507 U.S. at 226, 113 S.Ct. 1190. Similarly, in *Garmon*, the Court emphasized that our concern lies "with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration." 359 U.S. at 242, 79 S.Ct. 773. We are "preclude[d]" from conducting "an ad hoc inquiry" as to the effects of state regulation in a particular factual situation, because "[o]ur task is confined to dealing with classes of situations." *Id.* In other words, we take a categorical, not a piecemeal, approach to NLRA preemption.

The categorical approach to NLRA preemption precludes the prospect of finding some circumstances in which a statute is preempted and others where it survives. The all-or-nothing stakes of NLRA preemption renders the inquiry under *Salerno* moot, because once preemption is called for, the categorical nature of this conclusion automatically

commands that "no set of circumstances exists under which the [statute] would be valid." *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095. We hold that our preemption analysis by definition slices through the *Salerno* standard, and any dispute as to whether plaintiffs' challenge to the statute is facial is moot and need not be decided.

B

Appellants draw upon First Amendment jurisprudence, first noting that a legislature's refusal to subsidize protected speech does not offend the First Amendment, and then suggesting that AB 1889 be subject to a traditional First Amendment analysis. Among other cases, they point to *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), where the Supreme Court held that the federal government does not violate the First Amendment by prohibiting the use of federal funds in programs in which abortion is a method of family planning. *See also Lyng v. Automobile Workers,* 485 U.S. 360, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988); *Regan v. Taxation with Representation,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983).

The question before us, however, is not whether AB 1889 is consistent with the First Amendment. The operative question before us *is whether the California statute is preempted by federal labor law.* As we have explained, the detailed doctrines of *Garmon* and *Machinists* preemption have emerged to test whether a given enactment is preempted by the National Labor Relations Act. We find no basis to cast aside well-established preemption lines of analysis in favor of a doctrine grafted from cases that involve pure federal Constitutional challenges.

Even if AB 1889 would pass muster under the First Amendment, the question remains whether AB 1889 survives under the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI. That, of course, is the ultimate inquiry of the preemption analysis: Whether federal law, as established in the National Labor Relations Act,

preempts AB 1889. We apply the appropriate doctrines of preemption, answer in the affirmative, and that ends the matter. *See* Part III, *supra.* Appellants' proffered First Amendment cases (like *Rust v. Sullivan)* have no relevance to our Supremacy Clause-related inquiry.

C

Appellants rely on several *federal* statutes that limit employers' use of specific *federal* grant or program funds to advocate for or against union organizing. *See* Workforce Investment Act, 29 U.S.C. § 2931(b)(7)(providing that "[e]ach recipient of funds . . . shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing."); National and Community Service State Grant Program, 42 U.S.C. § 12634(b)(1) ("Assistance provided under this subchapter shall not be used by program participants and program staff to ··· assist, promote, or deter union organizing"). These statutes are similarly unavailing in altering our inquiry under the Supremacy Clause.

Federal preemption principles do not apply to possible conflicts between two federal statutes. *Chao v. Bremerton Metal Trades Council, AFL-CIO,* 294 F.3d 1114, 1119 (9th Cir.2002). Congress has the authority to impose certain restrictions where it sees fit. Further, the federal statutes at issue apply to only a few discrete areas of federal spending and are narrow in scope. These federal statutes are far removed from allowing us to infer an overriding congressional intent to permit the State of California to intrude into the union organizing process, and the nationwide operation of the National Labor Relations Act, through AB 1889.

VI

We hold that Section 8(c) of the National Labor Relations Act explicitly protects the free speech rights of employers in the labor relations context and conclude that the National Labor Relations Act, and the accompanying doctrines of

Garmon and *Machinists* preemption, completely preempt the California statutory provisions at issue with respect to any employer who is subject to regulation by the National Labor Relations Act.

AFFIRMED.

FISHER, Circuit Judge, dissenting:

This case requires us to balance two important governmental interests: the ability of states to control the use of their own funds, and the federal government's national labor policy. The majority's critical error is in failing to recognize our responsibility to honor both of these interests to the extent possible-instead, it gives short shrift to California's sovereignty interests through an overbroad application of federal labor preemption doctrine that conflicts with both our past precedent and that of the Supreme Court. The majority's preemption analysis subverts important federalism principles, and therefore I must respectfully dissent.

I agree with many—although not all—of the majority's characterizations of the complex labor preemption doctrine upon which this case turns. My main difference is in how I answer the question upon which the fate of AB 1889 turns: if a state allows employers to spend their *own* funds, in whatever manner they please, to advocate for or against unionization, does national labor preemption doctrine require the full preemption of a restriction on the use by employers of *state funds alone* for such purposes? I think not. As the Supreme Court has recognized, the State of California has the right to restrict the use of its own funds; and a more nuanced application of labor preemption law reveals that although certain parts of the statute may be preempted, its core restriction should survive.

"We are reluctant to infer preemption," *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) ("*Boston Harbor*"), and any

analysis of preemption begins with the "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). The majority concludes that AB 1889 is wholly preempted under both the *Garmon* and *Machinists* strands of labor preemption doctrine, so I will separately explain why neither conclusion is correct. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (" *Machinists* "). However, although the two doctrines require different analyses, the majority misses a fundamental truth that explains why neither doctrine requires the preemption of AB 1889. As the Supreme Court has explained in a related context, and as logic dictates, when a state restricts merely the use of state funds for a given activity—without regulating an employer's ability to pursue that activity with its own funds—the state is not directly regulating that activity. Because both the *Garmon* and *Machinists* preemption doctrines share a predicate inquiry into what activity is being regulated, the fact-ignored by the majority-that California is not actually regulating the speech at issue precludes full preemption under either doctrine.

I. AB 1889 Is Not Preempted Under Garmon

Garmon preemption arises when there is an actual or potential conflict between state regulation and federal labor law-when a state regulates activity that is actually or arguably protected or prohibited by the NLRA. *Garmon*, 359 U.S. at 244, 79 S.Ct. 773. The majority concludes that AB 1889 is preempted because it regulates activity that is actually protected by the NLRA.

First, employer union-related speech is not *actually protected* by the NLRA, but rather protected by the First Amendment, and therefore simply left *unregulated* by the

NLRA. AB 1889 is therefore properly analyzed under the *Machinists* strand of labor preemption doctrine. Second, AB 1889 does not actually regulate such activity in any case. Third, were I wrong about both of these conclusions, AB 1889 would still not be preempted under *Garmon*.

A. *The NLRA Does Not "Actually Protect" Employer Speech*

The majority concludes that the NLRA actually protects employer free speech rights-that it affirmatively grants protection to employers' speech on unionization. An examination of the structure and text of the NLRA demonstrates that the majority has misread it.

Section 7 of the Act is entitled "Right of employees as to organization, collective bargaining, etc." 29 U.S.C. § 157. It identifies areas of protected employee conduct, and can fairly be characterized as setting forth those employee practices that are actually protected by the NLRA. Section 8, conversely, is entitled "Unfair Labor Practices." 29 U.S.C. § 158. By its plain terms, it sets forth activities that are actually prohibited by the NLRA. It is easy to see how both Sections 7 and 8, then, can be implicated in a *Garmon* preemption analysis: if a state regulates employee activities that are actually protected under Section 7, or activities by either employers or labor unions that are actually prohibited under Section 8, that regulation will be preempted.

The majority, however, has a novel view of Section 8's third subsection, which is entitled "Expression of views without threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This subsection has been termed the "free speech" exemption to Section 8's definition of unfair labor practices, because it carves out noncoercive speech from the category of actually prohibited activity. From this statutory structure, the majority concludes, "[w]e hold that Section 8(c) of the [NLRA] . . . explicitly protects the right of employers to express their views about unions and union organizing efforts." Maj. Op. at 12185. This is simply

wrong, explaining why this circuit has never so held, requiring the majority to do it now, so late in the day. *See, e.g., Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corporation,* 961 F.2d 1464, 1470 n. 9 (9th Cir.1992) ("[S]ection 8(c) merely states an employer does not commit an unfair labor practice by expressing its views regarding unionization."); *UAW-Labor & Employment & Training Corp. v. Chao,* 325 F.3d 360, 364-65 (D.C.Cir.2003) ("Fitting a *Garmon* claim under the language of § 8(c) is awkward .... [T]he activities described in § 8(c) ... are not 'protected *by*' the NLRA, except from the NLRA itself.") (emphasis in original).

The majority sets forth no textually grounded explanation for its conclusion that one section of the Act, entitled "Unfair Labor Practices," actually grants an affirmative right, and instead offers only misleading quotations from legislative history and caselaw. Again and again, the majority cites references to employers' "right of free speech." *See, e.g.,* Maj. Op. at 982. But there is no mystery about the actual source of this right. It is the First Amendment. When Congress passed the NLRA and set forth a list of prohibited actions, it saw fit to clarify that noncoercive speech-the sort protected by the First Amendment-did not constitute an unfair labor practice. Indeed, without such a qualifier, the constitutionality of the NLRA might well have been at issue.[10] The majority's authorities never go any further than explaining that employer speech is a necessary part of healthy labor relations. The majority seeks to use these broad platitudes to support its illogical reading of the NLRA,

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[10] Amicus curiae the National Labor Relations Board ("NLRB")-the very entity whose primary jurisdiction over labor related issues is protected by *Garmon*-makes no such claim as to 8(c)'s supposed affirmative grant of speech rights. *See NLRB Amicus Brief* at 4, 21-26 (echoing interpretation of the Act offered above, and noting Section 8(c)'s "exemption" for noncoercive speech).

in order to identify an "actually protected right" in the Act itself.

This is not to say that there is no preemption issue here-it is just that it is best understood as a *Machinists* issue, not a *Garmon* issue. As I shall illustrate below, *Machinists* preemption is the more appropriate doctrine under which to evaluate AB 1889, because the arguable impermissible effects of AB 1889 are on activities meant to be left *unregulated* by the NLRA, not because of any direct conflict with the protections and prohibitions of the Act.[11]

B. *Even If AB 1889 Arguably Protects Employer Speech Rights, Garmon Preemption is Inappropriate*

It should be clear that Section 8(c) does not definitely protect employer speech rights; even if one were to disagree with my reading of the NLRA, one would have to grant that these two alternative readings present an unresolved conflict in our circuit. Let us assume, then, that AB 1889 *arguably* protects employer speech rights. Nonetheless, Supreme Court precedent shows that *Garmon* preemption is not appropriate here.

1. *The Local Interest Exception*

The Supreme Court has cautioned that "inflexible application of [the *Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). When conducting a *Garmon* preemption inquiry into whether regulation overlaps with NLRB jurisdiction, we

[11] Even if one were to disagree with my reading of Section 8(c), I explain below in the *Machinists* analysis how AB 1889 does not directly regulate employer speech in any case-meaning that even if Section 8(c) *did* grant employer speech rights, AB 1889 would not be preempted under *Garmon* because it does not regulate such speech. *See infra* Section II.

must therefore conduct "a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." *Id.* at 300, 97 S.Ct. 1056. This is to avoid preempting state regulation of conduct that involves "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we [cannot] infer that Congress ha[s] deprived the States of the power to act," or where "the activity regulated [is] a merely peripheral concern" of the NLRA. *Garmon,* 359 U.S. at 243-44, 79 S.Ct. 773; *see Belknap, Inc. v. Hale,* 463 U.S. 491, 498, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983).

The previously recognized exceptions to *Garmon* preemption have involved exercises of state court jurisdiction over universally recognized common law torts, rather than, as here, the exercise of a state's spending power. *See, e.g., Linn v. United Plant Guard Workers of America,* 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) ("[A] State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it is not preempted despite arguable overlapping NLRB jurisdiction over the speech at issue.") (quoting *Garmon,* 359 U.S. at 244, 79 S.Ct. 773). But the logic that compelled the Supreme Court to recognize the exception in the former category applies just as powerfully-if not more so-to local spending decisions. A state's control of its own purse strings is of at least as great concern to it as its power to regulate defamatory speech or trespassing. Just as the state has a responsibility to protect its citizens from such torts, so it has a responsibility and a right to spend its treasury-largely generated from the pockets of its citizens-based on principles and guidelines that the democratically elected legislature of that state deems to be appropriate. Such spending decisions are, of course, subject to federal supremacy concerns. But the Supreme Court has commanded us to be extremely cautious before concluding that a federal regulatory scheme

is meant to intrude upon such a fundamental state prerogative.

The majority gets the denominator wrong when it concludes that "regulating employer speech in the labor relations context . . . is not a traditional state interest, nor is it 'so deeply rooted in local feeling and responsibility' as to invoke the exception." Maj. Op. at 992. The majority ignores the broader state interest at issue-control over its own fisc-and inappropriately second-guesses the California legislature's motivations in exercising this prerogative. In an era of tightening budgets, where many important competing interests vie for every dollar of a state's treasury, it is all the more important that states retain their right to determine the best way to allocate their scarce resources. Today, the majority effectively forces California to fund employers' union-related expression with those scarce dollars.

2. *The Supreme Court's Refinement of Garmon in Sears*

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978), the Supreme Court refined its *Garmon* preemption doctrine in the context of an employer's common law trespassing suit against picketing union members where the picketing was "arguably-but not definitely-prohibited or protected by federal law." *Sears*, 436 U.S. at 182, 98 S.Ct. 1745. *Sears* divided the inquiry into two related but distinct questions: whether the state court's jurisdiction over the trespassing claim was preempted (1) by the arguably *prohibited* nature of the picketing, or (2) by its arguably *protected* nature.

As to whether the union's picketing was arguably prohibited by the NLRA, *Sears* articulated a relatively straightforward "primary jurisdiction" test: if the claim considered by the state tribunal is identical to one that could be presented to the NLRB, the state's jurisdiction is preempted. *Id.* at 197, 201, 98 S.Ct. 1745; *see also Belknap*, 463 U.S. at 511, 103 S.Ct. 3172 (applying primary

jurisdiction test to state regulation of arguably prohibited conduct). As to whether the picketing was arguably protected by the NLRA, the Court went beyond the primary jurisdiction test to address additional federal supremacy concerns-whether, despite the lack of identicality between issues the state court and NLRB might consider, preemption was warranted to protect against the risk of "misinterpretation of [the NLRA] and the consequent prohibition of protected conduct." *Sears*, 436 U.S. at 203, 98 S.Ct. 1745. We employed this "primary jurisdiction plus" approach in *Radcliffe v. Rainbow Const. Co.*, 254 F.3d 772, 786 (9th Cir.2001) (holding that state jurisdiction over claims by union members against employer for false arrest, false imprisonment and malicious prosecution were not preempted under *Garmon*).[12]

a. *Primary Jurisdiction*

The parties do not dispute that the NLRB has no interest in resolving the central controversy that a state court would have to resolve in enforcing AB 1889-whether state funds were used to "assist, promote, or deter union organizing." The focus of a lawsuit under AB 1889 would not be on whether employer speech was proper or improper, but on whether state funds were used to support that speech. Far from being identical to the kind of question the NLRB might consider, a suit under the California statute would be an accounting for the employer's possible misuse of funds, with no attention at all to the nature of the advocacy itself.

The Chamber of Commerce makes two arguments in response. It first argues that a state court enforcing AB 1889 would in some instances have to determine whether a union was a "labor organization" under § 16647, an area that it claims is reserved to the NLRB under *Marine Engineers*

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[12] In *Radcliffe*, defendants argued that "the validity of plaintiffs' claims . . . turns on whether the union activities carried on by the plaintiffs were . . . protected by § 7 of the NLRA." *Id.* at 785.

Beneficial Ass'n v. Interlake Steamship Co., 370 U.S. 173, 82 S.Ct. 1237, 8 L.Ed.2d 418 (1962). But even if the state court had to make such a determination, it would be relevant only to the ultimate question of whether an employer spent state funds on advocacy, not whether the advocacy violated the NLRA. We have previously rejected an argument that the incidental determination by a state court of whether persons were engaged "in lawful union activity" was sufficient to create *Garmon* preemption, where the focus of a state proceeding was on "state concerns of accommodating such union activity with the state-law rights of private property." *Radcliffe*, 254 F.3d at 786. Moreover, AB 1889 is not comparable to the Minnesota statute at issue in *Marine Engineers*, under which a state law determination that certain groups were not labor organizations permitted the state court to regulate picketing and other activities identical to those that could have been raised before the NLRB. *Marine Engineers*, 370 U.S. at 176, 82 S.Ct. 1237.

The Chamber of Commerce also argues that because AB 1889 restricts an employer's ability to "influence" its employees using state funds, *see* § 16645(a), California courts would effectively be deciding whether employers had improperly acted under § 8(a) of the NLRA "to restrain or coerce employees in the exercise of the rights contained in [§ 7 of the NLRA]." 29 U.S.C. § 158(a) (NLRA § 8(a)). However, were the NLRB to consider an unfair labor practice charge arising from the employer's conduct, it would focus on whether the employer had interfered with the employees' § 7 rights, regardless of whether the employer used state funds in the process. Under AB 1889, the California court would be determining only whether an employer used state funds for any attempt whatsoever to influence employees, not whether that attempt violated the NLRA. Thus, because the statute is focused only on control

over the use of state funding, there is no identicality of claims, and the primary jurisdiction test is not met.[13]

b. *Additional Supremacy Concerns*

Because of the arguably protected character of the speech at issue, we would next assess whether the state statute is preempted because Congress would "prefer[ ] the costs inherent in a jurisdictional hiatus to the frustration of national labor policy which might accompany the exercise of state jurisdiction." *Sears*, 436 U.S. at 203, 98 S.Ct. 1745.

For essentially the same reasons detailed above in the primary jurisdiction analysis, the risk that a state court applying AB 1889 could "misinterpret [ ] . . . federal law," *id.*, is nonexistent in this case. Not only is there no identicality of claims, but the subject matter of an AB 1889 suit is so far removed from the NLRA's primary focus—the determination of what constitutes an unfair labor practice—that any rationale for *Garmon* preemption is absent.

Sears itself provides a strong analogy. The Court, after noting the state interest in hearing trespass claims, identified a clear potential overlap between the NLRB's jurisdiction and that of the state court: "[T]he state court was obligated to decide [whether] the trespass was not actually protected by federal law, a determination which might entail an accommodation of Sears' property rights and the Union's § 7 rights. In an unfair labor practice proceeding initiated by the Union, the Board might have been required to make the same accommodation." *Id.* at 201, 98 S.Ct. 1745. The Court further noted that the trespass at issue was arguably protected by the NLRA, whereas previously recognized exceptions to *Garmon* preemption did not "involve [ ] protected conduct."

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[13] There is no merit to the Chamber of Commerce's claim that the California statute provides an additional remedy for NLRA violations. The statute's damages provisions are intended to remedy the misuse of state funds under the statute, regardless of whether any NLRA violation has occurred.

Id. at 204, 98 S.Ct. 1745. Nevertheless, the Court concluded that the risk that regulation of trespass might impermissibly trench upon the NLRB's jurisdiction over the speech rights of union members was too unlikely to justify usurpation of the state's prerogative. There was no "significant risk of prohibition of protected conduct," so the Court was "unwilling to presume that Congress intended the arguably protected character of the [regulated] conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action." *Id.* at 207, 98 S.Ct. 1745.

Here, I have noted the important state interest in determining how its funds are spent. Even if the exercise of this state prerogative could have some effect on the arguably protected advocacy rights of employers, given the nature and functioning of the statute-which has no concern for whether the speech at issue was protected by the NLRA, but only for where the money to fund it came from-there is no "significant risk of prohibition of protected conduct." *Id.* Indeed, the state interest is so strong that we cannot "presume that Congress intended the arguably protected character of the [regulated] conduct to deprive" California of the ability to control the use of its own funds in this manner. *Id.*

II. AB 1889 Is Not Wholly Preempted Under Machinists

Machinists preemption operates as a form of "labor field preemption"-it requires the preemption of any state regulation of activity that although not directly regulated by the NLRA, was intended by Congress "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation and citation omitted). AB 1889 is best viewed through this lens, because the employer expressive activity at issue is not protected or prohibited by the NLRA, but rather is an essential part of the NLRA's overall labor relations structure.

In enacting a restriction on the use of state funds with the purpose of remaining neutral in labor disputes, California has

not intruded on labor relations meant to be left unregulated by the states. The Supreme Court has specifically emphasized the legitimate governmental interest in remaining neutral in labor disputes. *See Lyng v. UAW*, 485 U.S. 360, 371-72, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988) (holding that a Congress' decision to avoid "subsidization" of striking workers through a food stamp program was legitimately based in Congress's "considered efforts to avoid favoritism in labor disputes"; noting that "we have little trouble in concluding that [the food stamp restriction] is rationally related to the legitimate government objective of avoiding undue favoritism to one side or the other in private labor disputes"). Indeed, state neutrality is not only consistent with the NLRA-it is in many cases *mandated* by the NLRA. Were a state to opt against neutrality by intervening on the side of employer or employee in a labor dispute, such an intervention could itself raise preemption problems. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) ("Even though agreement is sometimes impossible, government may not step in and be a party to the negotiations."). Thus, California's decision to avoid having its own funds used on either side of a labor conflict is clearly legitimate.[14]

Nor does the restriction on the use of state funds interfere with an employer's ability to engage in "self-help" in union organizing in the sense protected by *Machinists*. Restricting the use of the state's funds does not imply an attempt to alter an employer's private decision to support or oppose

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[14] The majority's extensive arguments as to the "real" purpose of AB 1889 are beside the point. Neutrality means not taking sides. Even if the majority is right that California is effectively preventing employers from using state funds to advocate *against* unionization only, California is still remaining neutral-and it is simply irrelevant whether the money would otherwise be spent to support unionization, oppose it, or in some combination.

unionization. An employer who wishes to oppose unionization using its own funds will not suffer any penalty in doing so. It is ironic that a doctrine meant to ensure that employers can engage in self-help is applied today to force government to help employers oppose unionization.

To be sure, under AB 1889 those employers in California who are currently receiving money from the state will be prevented from using those funds to speak about unionization. Because, according to the Chamber of Commerce, some employers are entirely funded by the state, under the statute some California employers may be prevented from spending any portion of their budgets to advocate during a labor dispute. However, such employers will be prevented from labor advocacy only because they have already chosen to fund their budgets entirely from the state-itself a business decision, and part of the free interaction of market forces that the NLRA is designed to protect.

It is implausible that Congress intended the *use* of state funds to be an area "unregulated because left to be controlled by the free play of economic forces"; state funds are by definition not controlled by the free play of economic forces. *Machinists,* 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation marks omitted); *see also Boston Harbor,* 507 U.S. at 225-26, 113 S.Ct. 1190. States are not "employers" under the NLRA, and the congressional goal of balancing relations between private employers and employees does not apply to state governments. 29 U.S.C. § 152(2). Addressing only the use of state funds does not address employer behavior in the private marketplace, which is what the NLRA is designed to regulate. *See* Archibald Cox, *Labor Law Preemption Revisited,* 85 Harv. L.Rev. 1337, 1352 (1972) (cited with approval in *Machinists,* 427 U.S. at 140 n. 4, 96 S.Ct. 2548) ("Two fundamental ideas lie at the core of the national labor policy: (1) freedom of employee self-organization; and (2) the voluntary *private* adjustment of conflicts of interest over wages, hours, and other conditions of employment

through the negotiation and administration of collective bargaining agreements.") (emphasis added). Because the statute creates a wall between publically funded activity and private activity, it does not make sense to hold that the California statute has violated *Machinists* simply by restricting the use of state funds.

The majority's critical error is its conclusion that a state's restricting employers' use of the state's own funds for labor-related advocacy *must* require the conclusion that it is regulating the labor field. This leap of faith is not supported by precedent or logic, and can only be maintained through an unwarranted vision of the statute's meddling effect on labor relations. As to the health and vitality of the labor relations debate itself, there is no evidence in the record that AB 1889's core restriction will do anything to undermine it.

Here is an illustrative example. Imagine that California had a certain amount of money that it wished to grant to hospitals to create more nurse positions. However, California wanted the money to go toward creating nurse positions-not toward funding a campaign to convince the new nurses not to unionize. So long as the recipient hospitals are still free to lobby the nurses to whatever extent they please with their existing treasuries, why should California be forced to fund such lobbying with the money that the state wishes to go toward funding the positions themselves?

The majority, then, has a problem: it purports to rely on the statute's "leverag[ing]of state funds" alone as requiring preemption, Maj. Op. at 980 n. 6, but cannot demonstrate how such leveraging alone can have anything but a negligible and incidental effect (at worst) on employer/employee union-related debates. The majority deals with this problem in two ways. First, it relies on the Supreme Court's opinion in *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), for the

proposition that just because California "has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict [with federal labor relations]." Second, it focuses on the statute's enforcement provisions as having an improper effect on employer speech.

A. *Gould, Rust and State Spending Power*

In *Gould,* the Supreme Court found preempted a statute that used a state's spending power to directly regulate labor relations. *Id.* at 291, 106 S.Ct. 1057. The statute held that a company found to have violated the NLRA three times within any five year period would be barred from doing any business with the state. In doing so, the statute made an employer's union-related conduct (in this case, whether or not it had violated the NLRA) a condition for the receipt of state funds. If an employer violated the statute, it could not receive the state funds (or, of course, spend them) for any purpose. *Id.* at 283-84, 106 S.Ct. 1057.

Likewise, in *Golden State,* the Court found preempted a city's decision to condition renewal of a cab franchise on settlement of a labor dispute. *Golden State,* 475 U.S. at 616-18, 106 S.Ct. 1395. Once again, the employer's labor-related activity (in this case, settling a labor dispute) was made a condition for the receipt of state funds. If the employer did not act in the labor arena in the way the city demanded, the employer could not receive the state funding (or franchise). In both cases, the Supreme Court concluded that such conditioning of funds constituted direct regulation of the activity at issue-and was therefore preempted.

If California had made employer neutrality a condition of the *receipt* of state grants or funds-that is, if it had made employer neutrality a condition of doing business with the state-I have little doubt that such a restriction would be preempted by the NLRA. As in *Gould* and *Golden State,* a condition on the receipt of funds would encourage employers to modify the spending of their private funds in labor

disputes in order to become eligible for state funding, and would therefore be a transparent effort to use the spending power to "introduce some standard of properly balanced bargaining power" and alter employers' private spending decisions. *Machinists,* 427 U.S. at 149-150, 96 S.Ct. 2548 (internal quotation marks and citation omitted).

The California statute at issue here has a crucial difference. A restriction on the *use* of state funds is different from a restriction imposed as a condition for the *receipt* of state funds. In the former instance, the employer has absolute freedom to spend its own funds however it wishes, so long as it does not spend state funds on its union-related advocacy; in the latter, the employer's use of its own funds is curtailed by the restriction. Preventing private employers from using state funds on pro- or anti-union activity does not, in and of itself, undermine the NLRA bargaining process protected by *Machinists.* Such a restriction affects that process only to the extent that it allows the state to maintain its own neutrality even as it funds private employers.

As such, the difference between the statutes at issue in *Gould* and *Golden State* and AB 1889 can be analogized to the circumstances of *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), where the Supreme Court distinguished between statutes that impose conditions on the receipt of state funds from statutes that simply limit the uses to which those funds may be put. *Id.* at 198, 111 S.Ct. 1759. I agree with the majority that "the question before us . . . is not whether AB 1889 is consistent with the First Amendment." Maj. Op. at 994. However, *Rust* is about more than just the First Amendment. It also reveals the Supreme Court's understanding of what constitutes direct regulation through a state's spending power. The Court held in *Rust* that "[b]y requiring that the ··· grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has ··· not denied it the right to engage in abortion-related activities." *Rust,* 500 U.S. at 198, 111 S.Ct. 1759. With these words, the Court signaled what

the majority misses today: such a restriction on the use of government funds is not direct regulation of the activity. Instead, "Congress has merely refused to fund such activities out of the public fisc." *Id.*

Likewise, here, California has not "denied" employers the "right to engage in [union]-related activity," but "merely refused to fund such activities out of the public fisc." *Id.* This conclusion operates independently of First Amendment doctrine: it simply follows from the Court's observations about what is regulation and what isn't. The issue in *Rust* was whether a statute was invalidated by the First Amendment; here, it is whether a statute is invalidated by federal labor preemption doctrine. These are different inquiries, but they share the same predicate inquiry into what activity is being regulated. In *Rust*, the Supreme Court offered guidance on this separate inquiry, and we should not ignore its obvious relevance here.

The Supreme Court was clear in *Gould* that "[n]o other purpose [than regulating labor relations] could credibly be ascribed [to the statute], given the rigid and undiscriminating manner in which [it] operates: firms adjudged to have violated the NLRA three times are automatically deprived of the opportunity to compete for the State's business." *Gould*, 475 U.S. at 287-88, 106 S.Ct. 1057. By contrast, AB 1889 is both flexible and discriminating: it *discriminates* between employers' use of their own funds, which is permitted, and of state funds, which is not; and it allows employers the *flexibility* to use their own funds for union-related advocacy. Further, a very different purpose could credibly be ascribed to it: to help the state remain neutral in labor disputes.

Rust's analysis of what kinds of exercises of the state spending power constitute direct regulation of activity is arguably controlling here. At the very least, it illustrates how the majority has misunderstood the nature of the regulation at issue.

B. *AB 1889's Enforcement Provisions*

The majority further argues that AB 1889's enforcement provisions have effects that require preemption. As I will explain, I agree with several of the majority's conclusions in this regard-but these conclusions provide no basis whatsoever for holding, as the majority has, that the restriction on the use of state funds is itself preempted.

My own analysis leads me to conclude that although AB 1889's core restriction survives preemption, several of its enforcement provisions may in their effect go beyond assuring California's neutrality in labor disputes and instead pressure employers themselves to remain neutral in labor disputes. The majority identifies these problems as well, arguing that "[b]y creating exacting compliance burdens, strict accounting requirements, the threat of lawsuits, and onerous penalties, the statute chills employer speech on the merits of unionism, and adds that" "[t]he potential cost of litigation, plus the threat of severe penalties threaten to effectively halt employer campaigns . . . " Maj. Op. at 978. The majority then details what it considers to be the evils of "the compliance provisions," the "documentation demands" and other enforcement provisions. Maj. Op. at 979.

In certain respects, I share the majority's concerns. Some of the statute's enforcement provisions appear to have an impermissibly intrusive effect on the NLRA's balance of private actions between employer and employee, by exposing employers to the risk of significant litigation costs and punitive sanctions if they support or oppose unionization, even without using state funds.

The majority, however, uses these intrusive effects, which derive solely from a few specific enforcement provisions, as a proxy for finding the entire statute preempted. The majority has held that the restriction on the use of state funds must be preempted, but only marshaled arguments against a narrower subset of the statute's provisions-those that implement and enforce the restriction.

C. *Dalton and Partial Preemption*

"In a pre-emption case such as this, state law is displaced only to the extent that it actually conflicts with federal law. . . . .The rule is that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476, 116 S.Ct. 1063, 134 L.Ed.2d 115 (1996) (internal citations and quotation marks omitted). Thus, in order to resolve this case, we have an obligation to determine which parts of the statute are preempted and which are not.

The majority attempts to avoid this obligation by concluding that regardless of how the statute is enforced, "the balance of power as between labor unions and employers would still be improperly disturbed." Maj. Op. at 989. But how? The majority fails to establish that the restriction on use of state fund is itself preempted. Once one strips from the majority opinion all of its warnings about the effects of the enforcement provisions, there is nothing left to trigger preemption.

Instead, the majority is content to point to vague "risks"—the risk that employers will "be accused of misspending state funds" or "of violating state law."[15] Aside from the few enforcement provisions the majority and I agree upon, these generalized risks are not sufficiently concrete effects to warrant striking down a sovereign act of the state of California-as the Supreme Court has made clear in *Dalton* and before. *See Boston Harbor*, 507 U.S. at 224, 113 S.Ct. 1190 (cautioning us to be "reluctant to infer preemption"); *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (stating that we must begin any

[15] The majority also stresses that employers would suffer the indignity of "need[ing] to maintain [financial] records," something that should not be entirely unfamiliar to private entities that receive money from state coffers.

preemption analysis with the "basic assumption that Congress did not intend to displace state law.").

Because I believe only certain enforcement provisions sufficiently risk intrusion into areas preempted under *Machinists*, I would hold that only partial preemption is warranted. On the record before us, however, we are not in a position to determine with certainty which parts of AB 1889 must be found preempted. As made clear by the majority, both in the district court and before us, the parties limited their preemption arguments to discussion of the statute as a whole. It would not be appropriate for us on this record to try to divide the statute's enforcement provisions into preempted and nonpreempted portions. For example, certain enforcement provisions, such as the requirement that employers segregate state and nonstate funds, may be designed to do no more than permit the state to erect a "wall" between state and non-state funds and to enforce a purely compensatory remedy when state funds are misused. To conclude that such provisions are preempted could call into question a state's power to require routine record-keeping requirements that apply in many different contexts to nonprofit corporations and other recipients of state grants.

Even on this record, however, it seems likely that at least some of the enforcement provisions—particularly those that relate to record-keeping—should survive preemption. Therefore, we should leave it to the district court to resolve such questions in the first instance on an appropriate record. We should remand to the district court so the parties can present arguments (and evidence, if necessary) about the separate statutory provisions in light of the preemption principles I have explained today. *See, e.g., Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir.2003) ("Although severability is a question of state law that we review de novo, we nonetheless consider it prudent to remand to the district court where we believe the district court is better able to decide the question in the first instance.") (internal quotation marks and citations omitted).

For the reasons set forth above, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

No. 03-55169

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC

CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

and

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants-Appellants.

Appeal from the United States District Court for the Central District of California Gary L. Taylor, District Judge, Presiding.

Filed April 20, 2004.

Before: BEEZER and FISHER, Circuit Judges, and ENGLAND, JR., District Judge.*

FISHER, Circuit Judge:

This case presents a convergence of two important governmental interests: the ability of states to control the uses of state funds and the federal government's national labor policy, expressed through the National Labor Relations

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* The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.

Act ("NLRA"). The question is whether these two interests conflict here, such that the NLRA overrides California's interest. Specifically, a California statute forbids employers who receive state grants or funds in excess of $10,000 from using such funding to advocate against or in favor of union organizing. We are constrained to conclude that California-acting as a regulator, not a proprietor in imposing these restrictions-has acted in such a way as to undermine federal labor policy by altering Congress' design for the collective bargaining process. Therefore, we hold that the California statute as written is preempted by the NLRA under *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) ("*Machinists*").

FACTUAL AND PROCEDURAL BACKGROUND

On September 28, 2000, California enacted Assembly Bill No. 1889, Cal. Gov't Code § 16645-49.[1] The preamble of the statute declares:

It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization and to prohibit an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract.

§ 16645, Historical and Statutory Notes, Section 1 of Stats.2000, c. 872.

[1] All citations to Cal. Gov't Code § 16645-49 are hereinafter cited as, *e.g.*, "section 16645."

Two provisions of the California statute are at issue on this appeal-sections 16645.2 and 16645.7. Section 16645.2(a) bars private employers who are "recipient[s] of a grant of state funds" from "us[ing] the funds to assist, promote, or deter union organizing." Section 16645.7(a) bars "[a] private employer receiving state funds in excess of [$10,000] in any calendar year on account of its participation in a state program" from using such funds "to assist, promote, or deter union organizing."

The phrase "assist, promote, or deter union organizing" includes "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . [or][w]hether to become a member of any labor organization." § 16645(a)(1)-(2). The statute specifies as prohibited "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." § 16646(a). Expressly exempted from the statute's reach are "activit[ies] performed" or "expense[s] incurred" in connection with, *inter alia,* "[a]ddressing a grievance or negotiating or administering a collective bargaining agreement" and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." § 16647(a), (d).

The statute requires employers covered by sections 16645.2 or 16645.7 to certify that no state funds will be used to assist, promote or deter union organizing. § 16645.2(c), 16645.7(b). The statute also requires employers who make expenditures to assist, promote or deter union organizing to maintain and provide upon request "records sufficient to show that state funds have not been used for those

expenditures." § 16645.2(c), 16645.7(c).[2] If an employer commingles state and other funds, the statute presumes that any expenditures to assist, promote or deter union organizing derive in part from state funds. § 16646(b).

Employers who violate sections 16645.2 or 16645.7 are subject to fines and penalties, which include the return of the state funds used for the prohibited purposes and a civil penalty equal to twice the amount of those funds. § 16645.2(d), 16645.7(d). Suspected violators may be sued by the State Attorney General or any private taxpayer. § 16645.8(a)-(c). Prevailing plaintiffs, and prevailing taxpayer intervenors who make substantial contributions, are "entitled to recover reasonable attorney's fees and costs." § 16645.8(d).

In April 2002, plaintiffs-appellees (collectively the "Chamber of Commerce") brought an action for injunctive and declaratory relief challenging the statute on numerous grounds, including NLRA preemption. The AFL-CIO and others (collectively the "AFL-CIO") intervened. In May 2002, the Chamber of Commerce moved for summary judgment. Defendants, who are the California Department of Health Services and state officials sued in their official capacity (collectively "California"), filed motions for summary judgment in August 2002.

On September 16, 2002, the district court granted partial summary judgment in favor of the Chamber of Commerce, holding that the NLRA preempts sections 16645.2 and 16645.7 under the Supreme Court's *Machinists* decision, because they "regulate [ ] employer speech about union organizing under specified circumstances, even though Congress intended free debate." The district court entered judgment in January 2003. It also issued an injunction prohibiting California and the AFL-CIO from taking any

[2] The statute does not require "employers to maintain records in any particular form." § 16648.

actions to enforce sections 16645.2 and 16645.7 against any employer covered by the NLRA.

STANDARD OF REVIEW

We review de novo both a district court's grant of summary judgment, *Winterrowd v. American General Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir.2003), and its preemption analysis, *Ting v. AT & T*, 319 F.3d 1126, 1135 (9th Cir.2003).

DISCUSSION

I. The Market Participant Exception to NLRA Preemption

Before addressing the merits of the preemption issue, we first must decide whether California's conditioning the use of its funds constitutes "regulation." "A prerequisite to preemption [under the NLRA] is a finding that the state or local action in question constitutes *regulation* of labor relations between employers and employees." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir.1996). The NLRA "does not preempt actions taken by a state when it . . . acts as a mere proprietor or market participant." *Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1037 (9th Cir.1999) (citing *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (" *Boston Harbor* ")). We conclude that California has acted as a regulator in enacting § 16645.2 and 16645.7, and that the market participant exception does not apply.

Two Supreme Court cases define the scope of the market participant exception: *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282, 287, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), and *Boston Harbor*, 507 U.S. at 218, 113 S.Ct.

1190.[3] In *Gould*, the Court addressed a Wisconsin statute that forbade state procurement agents from using state funds to purchase products manufactured or sold by "labor law violators," employers who had violated the NLRA three times within a five year period. 475 U.S. at 283-84, 106 S.Ct. 1057. Wisconsin conceded that it did not have the power to bar its residents from doing business with repeat violators of the NLRA. *Id.* at 287, 106 S.Ct. 1057. It argued, however, that its statutory scheme was not unlawful because the statute merely regulated the spending power of its procurement officers. *Id.* The Court found this to be a "distinction without a difference" because the Wisconsin statute "serve[d] plainly as a means of enforcing the NLRA. [Wisconsin] concede[d], as we think it must, that the point of [its] statute is to deter labor law violations and to reward fidelity to the law." *Id.* (internal quotation marks omitted). The Court emphasized the "rigid and undiscriminating manner" in which the statute operated, and held that"[n]o other purpose" could be ascribed to the statute than creating an additional remedy for violations of the NLRA. *Id.* at 287-88, 106 S.Ct. 1057.

In *Boston Harbor*, on the other hand, the Court held that the Massachusetts Water Resources Authority, a state agency, acted as a market participant when it required contractors working on the clean-up of Boston Harbor to agree to the terms of a project labor agreement negotiated by a project construction manager and a labor union. The Court concluded that there was "no question but that [the state

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[3] Our discussion here is limited to the context of the market participant exception under the NLRA. A market participant exception exists in a number of other contexts, such as cases under the Commerce Clause. *See, e.g., Big Country Foods, Inc. v. Bd. of Educ. of Anchorage*, 952 F.2d 1173, 1177-79 (9th Cir.1992) (discussing market participant exception in the dormant Commerce Clause context). We offer no opinion as to the applicability of our reasoning to the market participant exception in these other contexts.

agency] was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." 507 U.S. at 232, 113 S.Ct. 1190. The Court also noted that "the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project," and that there was no reason to believe that the government was motivated by anything but purely proprietary interests. *Id.*

We have applied these cases in a number of contexts, without formulating a general rule for applying the market participant exception. We held that the market participant exception did not apply to a California law that permitted employees in state-approved apprenticeship programs to receive less than the prevailing wage but required employees in non-approved apprenticeship programs to receive the prevailing wage. *See Dillingham,* 190 F.3d at 1037-38 (noting that the apprenticeship standards were not "based upon unique needs that the . . . project presented" and that the state was not motivated by "management concerns" in implementing the standards). On the other hand, we applied the exception and held that the City of Oakland was a market participant when it canceled a newspaper subscription and refused to continue to pay for advertising during a labor dispute. *Alameda Newspapers, Inc. v. City of Oakland,* 95 F.3d 1406, 1415-16 (9th Cir.1996). We have also held that a city may require private contractors to adhere to the terms of a collective bargaining agreement when doing business with the city. *Assoc. Builders & Contractors, Inc. v. City of Seward,* 966 F.2d 492, 496 (9th Cir.1992).[4]

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[4] *City of Seward,* which was decided before the Supreme Court's decision in *Boston Harbor*, creates some confusion about the relation of the market participant exception to other NLRA preemption doctrines. *City of Seward* concluded that "action taken by the state as a market participant is not automatically immune from NLRA preemption." 966 F.2d at 495. *Boston Harbor*, however, held explicitly that the "[NLRA] pre-emption doctrines apply only to state *regulation* " and it plainly held that "a State may act without offending the pre-emption principles of the

The combined teaching of these cases is that when a state uses its spending power to shape the overall labor market in a manner that is essentially nonproprietary, the market participant exception will not apply and the state action may be subject to NLRA preemption. We draw upon the reasoning of the Fifth Circuit, which uses a two-part test as an aid in determining when the market participant exception applies:

> First, does the challenged action essentially reflect the entity's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir.1999).

NLRA when it acts as a proprietor." 507 U.S. at 227, 229-30, 113 S.Ct. 1190. *Boston Harbor*, therefore, makes clear that once a state's action falls within the "market participant" exception, it is entirely protected from preemption under the NLRA. Therefore to the extent that *City of Seward* states otherwise, we hold that it has been overruled. *See Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir.2003) (en banc) (holding that we may overrule prior circuit precedent without taking a case en banc when the Supreme Court has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable"). Of course, as we hold here, a state may enact "regulation" through the use of its spending power.

The first prong, which looks to the nature of the expenditure, protects comprehensive state policies with wide application from preemption, as long as the type of state action is essentially proprietary. *See Building & Constr. Trades Dep't, AFL-CIO v. Allbaugh,* 295 F.3d 28, 34-36 (D.C.Cir.2002) (holding an executive order that applied to all federally funded construction projects not preempted, where the order concerned a project labor agreement that private employers often enter into in the construction field). The second prong, which looks at the scope of the expenditure, protects narrow spending decisions-decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services but that also do not have the effect of broader social regulation. *See, e.g., Alameda Newspapers,* 95 F.3d at 1417-18. Both prongs are methods of determining whether the state action at issue in fact constitutes regulation.

Here, we conclude that sections 16645.2 and 16645.7 are regulatory and thus not covered by the market participant exception. Turning to the first prong, the statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services, as measured by the similar behavior of private parties. Rather, the statute's preamble makes clear that the legislative purpose is not procurement, but preventing the state from influencing employee choice about whether to join a union. § 16645, Historical and Statutory Notes, Section 1 of Stats.2000, c. 872 ("It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. *For this reason,* the state should not subsidize efforts by an employer to assist, promote, or deter union organizing.") (emphasis added).

Nor do sections 16645.2 and 16645.7 have a narrow scope or any other element that would indicate that the statute is unrelated to broader social regulation. To the contrary, the statute by its design sweeps broadly to shape policy in the overall labor market. The statute applies to all employers in

California who accept any state grant or funding in excess of $10,000. § 16645.2, 16645.7. It imposes separate accounting requirements on any business that accepts a state grant or enters into a contract with the state for more than $10,000. *Id.* It contains a provision for civil penalties and permits private parties to file civil actions against employers who violate the statute. § 16645.2(d), 16645.8. The statute's scope indicates a general state position, not a narrow attempt to achieve a specific goal. Thus, there is no question but that sections 16645.2 and 16645.7 are designed to have a broad social impact, by altering the ability of a wide range of recipients of state money to advocate about union issues.[5] Therefore, we conclude that sections 16645.2 and 16645.7 are regulatory measures that do not fall within the market participant exception.

II. NLRA Preemption

That sections 16645.2 and 16645.7 are regulatory measures does not mean that they are automatically preempted by the NLRA. "We are reluctant to infer preemption," *Boston Harbor,* 507 U.S. at 224, 113 S.Ct. 1190, and any analysis of preemption begins with the "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). Preemption is a question of congressional intent, and the "purpose of Congress is the

[5] This case is thus distinct from *Alameda Newspapers,* where we concluded that a city's proclamation of support in favor of a labor union in an ongoing strike at a local newspaper, as well as the city's decision to refrain from purchasing advertisements and to cancel its subscriptions as a result of the strike, was not regulation subject to NLRA preemption. 95 F.3d at 1409. We emphasized the merely exhortatory nature of the proclamation, noting that "[t]he resolution has no binding force on anyone." *Id.* at 1414. We also noted that the cancellation of the subscriptions and refusal to advertise did not "have some 'real effect' or practical economic impact on the employer that is either different from that of the ordinary customer or is otherwise governmental in nature." *Id.* at 1416.

ultimate touchstone of pre-emption analysis." *Alameda Newspapers*, 95 F.3d at 1413 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978) (internal quotation marks omitted)). Although the NLRA contains no express preemption provision, the Supreme Court has articulated two distinct NLRA preemption principles: *Garmon* preemption, set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), which prohibits states from regulating in the zone reserved for NLRB jurisdiction, and *Machinists* preemption, set forth in *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976). *See Boston Harbor*, 507 U.S. at 224-26, 113 S.Ct. 1190. We hold that sections 16645.2 and 16645.7 are pre-empted under *Machinists*, and therefore do not reach the question of *Garmon* preemption.

Machinists preemption is based on the premise that by regulating certain parts of the collective bargaining process, Congress intended other parts to be free from state regulation and left "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation marks omitted). The doctrine "is based on the premise that 'the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining,' "which means that "neither a state nor the [NLRB] is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful.'" *Alameda Newspapers*, 95 F.3d at 1413 (quoting *Machinists*, 427 U.S. at 144, 149, 96 S.Ct. 2548). "*Machinists* pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor*, 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks omitted).

California and the AFL-CIO argue that Congress did not intend the NLRA to limit a state's ability to control its own funds. Conditions on the use of state funds are, they say, categorically different from more direct restrictions on the labor organizing process. Because sections 16645.2 and 16645.7 allow parties an unfettered ability to use non-state funds to advocate for or against union organization, California and the AFL-CIO claim that the statute merely affects California's use of its own funds and does not impermissibly regulate in any area the NLRA intended to be regulation-free.

This argument has some force. Congress has offered no explicit guidance in this area, either in the NLRA itself, or in the legislative history of the Act. *See Garner v. Teamsters, Chauffeurs and Helpers Local Union*, 346 U.S. 485, 488, 74 S.Ct. 161, 98 L.Ed. 228 (1953) ("The [N]ational Labor Management Relations Act ··· leaves much to the states, though Congress has refrained from telling us how much."). Moreover, the emphasis of *Machinists* preemption on "restrictions on economic weapons of selfhelp," *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986), poses a particular difficulty in the context of state restrictions on the use of a state's own funds, because when a state imposes such conditions it is arguably not restricting self-help by private parties but merely the degree to which state money is used to fund such self-help. Because the California statute regulates no more than the uses to which California's own funds are put, rather than imposing a collateral penalty on additional private behavior not funded by the state, the Supreme Court cases that have found state exercises of the spending power preempted by the NLRA are not directly controlling. *See Gould*, 475 U.S. at 287-89, 106 S.Ct. 1057 (state denying procurement business to private employers who were repeat labor law violators); *Golden State*, 475 U.S. at 615, 618, 106 S.Ct. 1395 (city conditioning renewal of a taxi company's franchise on settlement of a labor dispute).

Nonetheless, we conclude that the NLRA preempts the California statute. Although the *Machinists* doctrine does not normally prevent neutral state regulation of the labor market, it does prevent state law that both explicitly targets and directly regulates processes controlled by the NLRA. Because the California statute, on its face, directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process, it interferes with an area Congress intended to leave free of state regulation. It is therefore preempted under *Machinists*.

A. *Machinists* and Advocacy for or Against Union Organizing

As explained above, the theory of *Machinists* preemption is that by establishing certain parameters for the union organizing process in the NLRA, Congress intended to leave other aspects of the bargaining process to the "free play of economic forces" and otherwise unregulated by the states. *Machinists*, 427 U.S. at 140, 96 S.Ct. 2548 (noting that the "crucial inquiry" is whether "Congress intended that the conduct involved be unregulated because left to be controlled by the free play of economic forces") (internal quotation marks omitted). The ability of labor and management to advocate for or against unionization is one such aspect of the collective bargaining process. 29 U.S.C. § 158(c) (NLRA § 8(c)) provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

An extensive jurisprudence has developed around Congress' balancing of speech interests in the context of labor organizing, a jurisprudence emphasizing that open and robust advocacy by both employers and employees must

exist in order for the NLRA collective bargaining process to succeed. *See Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union*, 302 F.3d 998, 1009 (9th Cir.2002) ("Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in uninhibited, robust, and wide-open debate.") (internal quotation marks omitted). We note further that where the NLRA has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. Sections 8(a) and 8(b) of the Act set out a series of restrictions in the form of unfair labor practices on the ability of employees and unions to achieve their goals, whereas section 8(c) expressly exempts the general expression of views on union organization from these restrictions. *See, e.g.*, 29 U.S.C. § 158(b)(7) (NLRA § 8(b)(7)) (prohibiting, in certain circumstances, picketing by a labor union where the union is not certified as the representatives of the employee).

To be sure, the states are not forbidden from any and all regulation of employer and union speech during the collective bargaining process. *See, e.g., Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 61, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (upholding state jurisdiction over defamation suits in the context of union organizing, but limiting such jurisdiction to defamation made with actual knowledge of falsity or reckless disregard for the truth). But an overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization.[6] *See NLRB v. Jones &*

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[6] We do not decide here whether such open debate on unionization is an affirmative right that the NLRA itself "protects" or "arguably protects," which would be necessary predicates for a finding of *Garmon* preemption. *See Golden State*, 475 U.S. at 613, 106 S.Ct. 1395 (explaining that *Garmon* preemption prohibits states from regulating

Laughlin Steel Corp., 301 U.S. 1, 45, 57 S.Ct. 615, 81 L.Ed. 893 (1937) ("The theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel."). The NLRA's declared purpose is to "restor[e] equality of bargaining power" by, among other ways, "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." 29 U.S.C. § 151 (NLRA § 1).

Therefore, by addressing employer actions that assist, promote or deter union organizing, California's statute targets a process necessary to the functioning of the overall process established by the NLRA. As one influential authority puts it:

> Providing a legal framework for self-organization and collective bargaining involves determining not only how far the conduct of employers and unions should be regulated but also how far they should be free. In revising the employer unfair labor practice provisions of the Wagner Act in 1947, Congress necessarily decided not only what coercive tactics should be forbidden, but also what methods of persuasion should be permitted employers seeking to induce their employees not to join labor unions.

"activity that the NLRA protects, prohibits, or arguably protects or prohibits"). Our holding rests entirely on the belief that California is preempted under *Machinists* from regulating pro-or anti-unionization advocacy because such regulation interferes with the *process* protected by the NLRA, not any specific right protected by the statute.

Archibald Cox, *Labor Law Preemption Revisited,* 85 HARV. L. REV. 1337, 1352 (1972) (cited with approval in *Machinists,* 427 U.S. at 140 n. 4, 96 S.Ct. 2548).

B. Direct State Interference

To violate *Machinists,* however, the state regulation at issue must do more than incidentally affect the union organizing process. The Supreme Court has consistently distinguished between state laws of general applicability (such as regulation of labor conditions), which generally are not preempted by the NLRA, and state regulation of the NLRA process itself, which generally is preempted. *See Machinists,* 427 U.S. at 156, 96 S.Ct. 2548 (Powell, J., concurring) ("[The *Machinists* doctrine] does not ··· preclude the States from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an indirect effect on relative bargaining strength."). For example, state regulation of minimum labor conditions is generally not preempted. *See Metropolitan Life,* 471 U.S. at 753, 105 S.Ct. 2380 (holding that the NLRA is not particularly concerned with, and is not intended to affect, the "substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions"); *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 20-21, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) (holding that because "[b]oth employers and employees come to the bargaining table with rights under state law that form a backdrop for their negotiations," the NLRA does not preempt substantive minimum labor standards, although it does preempt direct state interference with the NLRA's "equitable bargaining process") (internal quotation marks omitted). Nor will the NLRA normally preempt ordinary state contract law of general applicability. *See Belknap, Inc. v. Hale,* 463 U.S. 491, 500, 103 S.Ct. 3172, 77 L.Ed.2d 798 (holding that the NLRA does not preempt state law contract actions by

replacement workers to enforce terms of an employment contract).[7]

The situation is different, however, when the state regulation directly targets a process that is central to the union organizing and collective bargaining system established by the NLRA. This is true regardless of whether the direct state regulation is designed to benefit employers, employees or even the public at large. As Justice Powell noted, "State laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining." *Machinists,* 427 U.S. at 156 n.*, 96 S.Ct. 2548 (Powell, J., concurring).

Moreover, for the purposes of this analysis, we are concerned with the state statute's function, not its form. We are to focus on "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State,* 475 U.S. at 614 n. 5, 106 S.Ct. 1395 (internal quotation marks omitted); *see also Gould,* 475 U.S. at 289, 106 S.Ct. 1057 ("It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern."). In *Golden State,* the Court explicitly rejected the argument that state regulation was immune from *Machinists* preemption because the regulation took the form of a traditional use of local authority to grant a benefit, and preempted an exercise of a city's decision to grant a taxi franchise. 475 U.S. at 615, 618, 106 S.Ct. 1395. Although a state's ability to control the use of its funds is an important state interest, regulation that

[7] We also note that *Garmon* permits considerable latitude to states to enforce traditionally local law. "Under *Garmon,* a state may regulate conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to pre-empt the application of state law." *Belknap,* 463 U.S. at 509, 103 S.Ct. 3172.

specifically targets and substantially affects the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds.

C. The California Statute

To summarize, state regulation is preempted when it directly targets and substantially affects open employer discussion about unionization, even if such regulation comes in the form of a restriction on the use of state funds. The focus of our preemption analysis is on whether the state statute directly interferes with federal labor policy, not the state statute's formal nature. *See Gould,* 475 U.S. at 289, 106 S.Ct. 1057. Under these principles, the California statute is clearly preempted, even though it restricts only the use of California's own funds.

The statute has both the explicit purpose and the substantive effect of interfering with the NLRA system for organizing labor unions. By explicitly targeting activity designed to "assist, promote, or deter union organizing" the statute is on its face designed to interfere directly with the NLRA's own system for the promotion or deterrence of union organizing by employers and employees. The statute will alter the NLRA process of collective bargaining and union organizing, because an employer who decides against neutrality will incur both compliance costs and litigation risk. Employers are required to maintain separate accounts for state funds and non-state funds (if they wish to use any private funds for speech on union organization), and they must make those records available to the state's attorney general upon request. § 16645.2(c). If an employer fails to keep such records, any funds spent on assisting, promoting or deterring union organization will be allocated "between state funds and other funds on a pro rata basis," which means that an employer who fails to segregate funds and then spends any money assisting, promoting or deterring union

organizing is automatically subject to the statute's remedial provisions. § 16646(b); *see* § 16645.2(d), 16645.7(d).

Crucially, the statute contains not only a provision for compensatory damages to the state and injunctive and equitable relief, but also makes employers who violate the statute liable for a civil penalty of up to twice the amount of state funds spent on union organizing. § 16645.2(d), 16645.7(d). An additional provision permits any state taxpayer-including, of course, a union in a dispute with an employer-to bring a suit under the statute. § 16645.8. Thus, the statute imposes not merely a corrective remedy for the misuse of state funds, but risks imposing an actively punitive sanction on employers engaged in union organizing disputes. The Supreme Court has warned that such punitive measures are of particular concern in the NLRA context. *See Gould,* 475 U.S. at 288 n. 5, 106 S.Ct. 1057 ("The conflict between the challenged . . . statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of [the] remedy.")

The statute, therefore, both substantially and purposefully alters the balance of forces in the union organizing process, interfering directly with a process protected by the NLRA. We need not decide whether any one aspect of the statute, taken alone, would suffice to warrant preemption. Taken as a whole, the statute constitutes substantive regulation of "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks omitted). We therefore must hold that it is preempted by federal law.

D. Facial v. As-Applied Challenge

California and the AFL-CIO further argue that preemption should not apply because this is a facial, not an as-applied, challenge, noting that a facial challenge to a statute will be upheld only when a challenger can "establish that no set of circumstances exists under which the Act would be valid."

United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987) (applying *Salerno* standard to a statutory preemption case). The Chamber of Commerce responds that this is an as-applied challenge, with the question being whether the statute is invalid as applied to all employers covered by the NLRA. We need not decide whether the *Salerno* standard applies here, because even if it did sections 16645.2 and 16645.7 would be preempted as to all employers covered by the NLRA.

The facial/as-applied distinction would be relevant only if we might find some applications of the statute preempted and others not. In some cases, statutes will have certain applications that do not regulate in an area controlled by the NLRA, and this will be an appropriate distinction. For example, that the City of Los Angeles' use of its franchise power was preempted under the facts of *Golden State* did not mean that the NLRA preempted the city's ability to franchise taxi companies generally. *See* 475 U.S. at 619, 106 S.Ct. 1395.

Where a party makes a facial *Machinists* preemption challenge to a statute that directly targets a process established by the NLRA, however, the question is not whether the application of a state statute to a single set of facts is permissible, but whether the state has acted to regulate generally in an area that Congress intended to be "a zone free from all regulations, whether state or federal." *Boston Harbor*, 507 U.S. at 226, 113 S.Ct. 1190. In these circumstances, we are concerned with delimiting areas of potential conflict:

> potential conflict of rules of law, of remedy, and of administration. The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and

> degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. . . . Our task is confined to dealing with classes of situations.

Garmon, 359 U.S. at 242, 79 S.Ct. 773. Thus, where a state statute is in direct conflict with the NLRA or one of its processes, our focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation.

This principle is particularly apposite here, because forcing courts to make case-by-case judgments on the permissible scope of the California statute would encourage some dubious judicial line-drawing. From our *Machinists* analysis above, it is clear that the statute would be preempted as applied to a private business funded entirely by the state. But would the statute be preempted as applied to a business that receives 25 percent of its funds from the state? What about one that takes only 15 percent of its income from state funds? It is difficult to discern a principled basis upon which to draw these distinctions. Given the Supreme Court's clear instructions about the purposes of labor law preemption, we cannot embrace the legal uncertainty-and resulting litigation-that would arise from a more piecemeal approach.

We hold that the California statute is preempted because California has burdened the NLRA through the very act of regulating. There is thus "no set of circumstances ··· under which the Act would be valid" as to employers covered by the NLRA. *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095. Even assuming *arguendo* that the Chamber of Commerce's preemption challenge is properly characterized as facial, the statute is still pre-empted.

E. The First Amendment, State Subsidies and NLRA Preemption

We must also consider an analogy California and the AFL-CIO draw from constitutional law. First Amendment jurisprudence distinguishes direct restrictions on speech from instances where the government limits the use of government

funds to subsidize speech or conduct. *See, e.g., Rust v. Sullivan,* 500 U.S. 173, 192-93, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (holding that Congress may require recipients of federal funds to refrain from using those funds to encourage, promote or advocate for abortion as a means of birth control); *Regan v. Taxation with Representation of Wa.,* 461 U.S. 540, 545-46, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (holding that Congress did not violate the First Amendment by denying a tax exemption to groups that engage in lobbying); *Lyng v. UAW,* 485 U.S. 360, 369, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988) (holding that the federal government is not required by the First Amendment to subsidize an employee's right to expression on union matters by allowing a striking worker to receive food stamps). These cases hold that the government may choose to subsidize particular speech on particular issues without automatically running afoul of the First Amendment. There is a further distinction between cases "in which the Government has placed a condition on the *recipient* of the subsidy . . ., thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program," and cases in which the government merely restricts the use of its own funds. *Rust,* 500 U.S. at 196-97, 111 S.Ct. 1759. Although conditions on a grant recipient may violate the First Amendment under the "unconstitutional conditions" jurisprudence, the government is allowed more constitutional latitude in directing the expenditure of its own funds. *Id.* at 197, 111 S.Ct. 1759.

The issue here is not whether California may as a constitutional matter exercise control over its own funds to discourage speech about union organizing. Rather, we must look to see whether Congress intended, when it enacted the NLRA, to allow California to exercise its spending power in this manner. Use of constitutional doctrine in this area is solely by analogy, and we must determine whether California and the AFL-CIO's analogy to the First Amendment is apt. In some NLRA cases, drawing on First

Amendment analogies to construe the statute will be appropriate. *See Linn,* 383 U.S. at 67, 86 S.Ct. 657 (applying constitutional standards in statutory interpretation of the NLRA, but noting that "[w]e deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act").

However, First Amendment concepts cannot be imported wholesale in construing the NLRA for the purpose of preemption analysis-especially when to apply constitutional analysis mechanically would substantially alter the balance of forces established by Congress under the statute. We have long recognized that the balance between employer and employee expression established by the NLRA differs substantially from the standard First Amendment balancing of speech interests. *See, e.g., NLRB v. Associated Gen. Contractors, Inc.,* 633 F.2d 766, 772 n. 9 (9th Cir.1980) ("Association that would otherwise be protected [by the First Amendment] may be regulated if necessary to protect substantial rights of employees or to preserve harmonious labor relations in the public interest."); *White v. Lee,* 227 F.3d 1214, 1236-37 (9th Cir.2000) ("The First Amendment rights of employers in the context of the labor relations setting are limited to an extent that would rarely, if ever, be tolerated in other contexts. . . . Regulations controlling . . . expressive activity[in the labor context] would almost certainly be invalid outside the labor relations setting.") (internal quotation marks omitted). If the unique balance between employer and employee speech established by the NLRA imposes unique constraints on expression by individuals, there is no reason to believe that it does not also impose unique constraints on the ability of states to influence expression through government subsidies.

Put simply, we should not assume that Congress would intend to create a carefully balanced "regulation free zone," *Golden State,* 475 U.S. at 614, 106 S.Ct. 1395, under the NLRA and then permit states to regulate that zone through the device of conditions on state funding. The constitutional

analysis of cases like *Rust* is inapposite in this case.[8] Rather, the question we confront is the same one we would confront in any case of *Machinists* preemption: does the " 'exercise of plenary state authority to curtail or entirely prohibit self-help . . . frustrate effective implementation of the Act's processes[?]' "*Machinists*, 427 U.S. at 147-48, 96 S.Ct. 2548 (quoting *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969)). For the reasons we have discussed above, we conclude that the California statute does impermissibly interfere with processes that the NLRA meant to leave free from regulation.

F. Federal Grant Programs

California and the AFL-CIO note a number of federal statutes that limit employers' use of specific *federal* grant or program funds to advocate for or against union organizing. *See, e.g.*, Workforce Investment Act, 29 U.S.C. § 2931(b)(7) (providing that "[e]ach recipient of funds . . . shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing."); National and Community Service State Grant Program, 42 U.S.C. 12634(b)(1) ("Assistance provided under this subchapter shall not be used by program participants and program staff to ··· assist, promote, or deter union organizing"). California

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[8] We also note that First Amendment doctrine is not as supportive of an unfettered ability of California to control its spending as California and the AFL-CIO suggest. Although the government is, when it is engaging in "governmental speech," entitled to a very substantial ability to condition the use of its own funds, where the party funded is "not the government's speaker" and the relevant advocacy "cannot be classified as governmental speech even under a generous understanding of the concept" the analysis differs from that of *Rust*. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-43, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). Although we offer no opinion as to how California's restrictions would fare under constitutional analysis, state regulation is not automatically immune from First Amendment concern simply because that regulation comes in the form of a subsidy rather than a prohibition.

and the AFL-CIO argue that the existence of these statutes is evidence of Congress' desire to permit regulatory schemes such as sections 16645.2 and 16645.7.

Although there is again some force to this argument, we are not persuaded that these federal program-grant restrictions were either intended to alter or actually did alter the "wider contours of federal labor policy." *Metropolitan Life,* 471 U.S. at 753, 105 S.Ct. 2380 (internal quotation marks omitted). Had Congress imposed a federal version of sections 16645.2 and 16645.7 with directly analogous spending restrictions on all federal government grants or expenditure, that would weigh significantly against finding preemption here. *See id.* at 755, 105 S.Ct. 2380 (inferring from the existence of federal minimum labor standards that Congress did not intend state minimum labor standards to be preempted by the NLRA). But this is not the nature of these few statutes, which-unlike the California statute's spending restrictions that affect all state grants over $10,000-apply only to certain, specific federal spending. Nor do these federal statutes contain comparable remedial provisions, such as section 16645.8's authorization of citizen suits or the civil penalty imposed by section 16645.2(d). Given the limited application and scope of these federal statutes, we find them to be too ambiguous a basis for inferring congressional intent to permit California's intrusion into the collective bargaining process through sections 16645.2 and 16645.7.

Each party shall bear its own costs on appeal.

AFFIRMED.

United States District Court, C.D. California, Southern Division.

THE CHAMBER OF COMMERCE OF THE U.S., et al. Plaintiffs,

v.

Bill LOCKYER, et al., Defendants.

No. SA CV 02-0377 GLT.

Sept. 16, 2002.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN PART

TAYLOR, District Judge.

Plaintiffs' Motion for Summary Judgment is GRANTED in part.

I. *BACKGROUND*

Plaintiffs filed claims for declaratory and injunctive relief regarding Defendants' enforcement of the California Assembly Bill 1889 adding California Government Code § 16645 and following. AB 1889 prohibits the use of state funds or property to assist, promote, or deter union organizing; allows remedies for such violations; and requires state fund recipients to maintain sufficient records to show state funds were not improperly used under AB 1889. The Attorney General may request a copy of such records.

Plaintiffs bring a Motion for Summary Judgment arguing AB 1889 is unconstitutional under the federal and California Constitutions and preempted by the National Labor Relations Act (NLRA), Labor Management Reporting and Disclosure Act (LMRDA), and the Medicare Act. Defendants and Intervenors[1] contend Plaintiffs' claims are barred by the 11th

[1] The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and California Labor Federal, AFL-CIO, are Intervenors defending AB 1889.

Amendment, the abstention doctrine, and Article III standing requirements.[2]

II. DISCUSSION

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A. Preliminary Issues

Defendants and Intervenors argue the Court should not consider the merits of the case because Plaintiffs lack standing and Plaintiffs' claims are barred by the Eleventh Amendment and the abstention doctrine.

1. *11th Amendment*

Defendants argue the Eleventh Amendment prevents the Court from considering Plaintiffs' claim based on violations of the California Constitution. The Eleventh Amendment has been interpreted as a grant of sovereign immunity to the states against suit in federal court. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). State officials may be subject to suits for declaratory and injunctive relief where enforcement of state law would violated the U.S. Constitution or federal statutes, *Ex Parte Young,* 209 U.S. 123, 166, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 281, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), but the Eleventh Amendment bars suits in federal court

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[2] Defendants and Intervenors motions to strike certain evidence tendered by Plaintiffs is DENIED. Such evidence does not change the outcome of this Order.

against state officials based on claimed violations of state law. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Central Reserve Life of North America Ins. Co. v. Struve,* 852 F.2d 1158, 1161 (9th Cir.1988). The Court will not take into account arguments based on violation of state law in considering the parties' motions for summary judgment.

2. *Standing*

Three components compose the constitutional minimum of Article III standing:

> "First, the plaintiff must have suffered an 'injury in fact'- an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

U.S. v. Hays, 515 U.S. 737, 742-43, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (quoting *Lujan,* 504 U.S. at 560-561, 112 S.Ct. 2130). The party seeking the exercise of jurisdiction in his favor has the burden of demonstrating his standing. *Hays,* 515 U.S. at 743, 115 S.Ct. 2431. An organization that has not suffered any injury itself may sue in a representative capacity for injuries to its members if at least one member has standing to present the claim asserted by the association, the interests sought to be protected are germane to the association's purpose, and neither the claim asserted nor the relief requested requires the members' individual participation in the suit. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

Plaintiffs apparently would not have standing to challenge § 16645.1, 16645.3, and 16645.4, governing reimbursement, activities, and expenditures of state contractors. Plaintiffs claims standing to challenge these sections "based on the

danger they are applicable" and may be interpreted to cover one or more of Plaintiffs, but do not present facts to support this contention. The injury posed by this potential interpretation is "conjectural or hypothetical," and is not sufficient to satisfy the injury-in-fact component of standing. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Plaintiffs also apparently would lack standing to challenge Gov.Code § 16645.6, a provision of AB 1889 prohibiting public employers receiving state funds from using those funds to "assist, promote, or deter union organizing," because the only public employers in the case, members of Plaintiff California Healthcare Association (CHA) are political subdivisions of the state. As political subdivisions of the state, members of Plaintiff CHA do not have standing to sue the state in federal court. *City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231, 233 (9th Cir.1980); *Palomar Pomerado Health System v. Belshe,* 180 F.3d 1104, 1108 (9th Cir.1999).[3]

However, Plaintiffs do have standing to challenge the remaining provisions of AB 1889. When any plaintiff has standing, the standing requirement is satisfied for all other plaintiffs who are proper parties on the same complaint because "the presence of one party with standing assures that [the] controversy before [the court] is justiciable." *Department of Commerce v. United States House of*

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[3] Plaintiffs incorrectly cite *Star-Kist Foods, Inc. v. County of Los Angeles,* 42 Cal.3d 1, 7-8, 227 Cal.Rptr. 391, 719 P.2d 987 (1986), as California Supreme Court authority rejecting *South Lake Tahoe.* In *Star-Kist,* the California Supreme Court exempted Supremacy Clause challenges from the *South Lake Tahoe* "no standing" rule because at that time, the Ninth Circuit had not yet applied the rule to a Supremacy Clause challenge. *Id.,* at 8, 227 Cal.Rptr. 391, 719 P.2d 987. The Ninth Circuit has since held no such exemption exists for Supremacy Clause challenges. *See Palomar Pomerado Health System v. Belshe,* 180 F.3d 1104, 1108 (9th Cir.1999).

Representatives, 525 U.S. 316, 328, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999); *Village of Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, 264, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). At least one Plaintiff, the United States Chamber of Commerce ("U.S.Chamber"), has standing to challenge the remaining provisions of AB 1889, which govern recipients of state funds grants, employers conducting business on state property, and private employers receiving state funds in excess of $10,000. Various U.S. Chamber members receive grants of state funds, conduct business on state property, receive state funds in excess of $10,000, currently use state funds in union-related activities, and do not keep records of the use of state funds. *See* Antonek Decl. ¶¶ 3-6; Hunte Decl. ¶¶ 2-4; Kampas Decl. Exh. B, C. The parties do not dispute Defendant Attorney General Lockyer intends to enforce AB 1889, and has done so through accounting demands and litigation. Plaintiffs have demonstrated an injury in fact redressable by this Court, and have standing to proceed.

3. Abstention

Defendants and Intervenors contend this Court should abstain from hearing the claims of Plaintiff California Association of Healthcare Facilities (CAHF) pursuant to *Younger v. Harris.* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)(explaining a federal court should not enjoin or interfere with pending state proceedings). *Younger* provides a federal court should abstain from review and dismiss an action if the federal action would "directly interfere with ongoing state judicial proceedings" involving identical constitutional issues, and the state court can address the federal parties' claims. *See id.* If the *Younger* standard is met, the Court does not have discretion to retain jurisdiction. *See Green v. City of Tucson,* 255 F.3d 1086, 1092-93 (9th Cir.2001).

Defendants and Intervenors argue the Court should dismiss CAHF because Summit Care California, Inc. and

Brier Oak Convalescent Inc., defendants and cross-complainants in *Lockyer v. Summit Care California, Inc., et al.*, a pending state court action concerning AB 1889, are members of CAHF.[4] As stated in this Court's July 2, 2002 Order, if membership in a Plaintiff association is established, such relief would directly interfere with the *Lockyer* action because any relief this Court would award in favor of Plaintiffs would operate to enjoin the pending state proceedings involving Fountain View. *See Cornwell v. Cal. Bd. of Barbering and Cosmetology,* 962 F.Supp. 1260, 1271 (S.D.Cal.1997). Defendants have not established such membership. There is evidence the state defendants own or operate three skilled nursing facilities that are members of CAHF, *see* Armentrout Decl. ¶¶ 6-7, but the Court's view is this is not enough. There is no evidence the state defendants themselves are members of CAHF.

Defendants and Intervenors also argue for the Court's abstention based on *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *Pullman* abstention is appropriate only when (1) the complaint involves a sensitive area of social policy, (2) a federal constitutional issue could be mooted or narrowed by a definitive state court ruling on state law issues, and (3) proper resolution of the potentially determinative state law issue is uncertain. *Fireman's Fund Ins. Co. v. City of Lodi,* 271 F.3d 911, 928 (9th Cir.2001). Abstention is not proper when the issue is one of federal preemption because preemption is not considered a "constitutional issue." *United States v. Morros,* 268 F.3d 695, 704 (9th Cir.2001).

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[4] During the briefing period for the motion and cross-motions for summary judgment, the state action, formerly *Lockyer v. Fountain View,* was amended to substitute Summit Care and Brier Oak as defendants in place of Fountain View. Parties to the current state action have stipulated the new defendants will assert the same claims and cross-complaint as did the original defendant Fountain View. *See* Def. Request for Judicial Notice, Exh. 4, 5.

Abstention is also inappropriate in First Amendment cases because the guarantee of free expression is an area of particular federal concern rather than simply a sensitive area of state social policy. *See Ripplinger v. Collins,* 868 F.2d 1043, 1048 (9th Cir.1989); *Yniguez v. Arizonans for Official English,* 69 F.3d 920, 930-931 (9th Cir.1995). Plaintiffs challenge AB 1889 on preemption and First Amendment grounds. It is proper for the Court to retain jurisdiction over the Plaintiffs' claims.

B. *Preemption*

The Court finds AB 1889 is preempted by the National Labor Relations Act (NLRA).

Two types of preemption are recognized under the NLRA. "*Garmon* preemption" forbids state regulation of activities actually or "arguably" protected by § 7 of the NLRA or constitute an unfair labor practice under § 8. *Building & Trades Council v. Associated Builders* ("*Boston Harbor*"), 507 U.S. 218, 224-225, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993); *see also San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243-244, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). "*Machinist* preemption" prohibits state and municipal regulation of activities not protected or regulated by the NLRA if Congress intended for these activities to remain unregulated. *Building & Trades Council,* 507 U.S. at 225-226, 113 S.Ct. 1190; *see also Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 138, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

The NLRA § 8(c) provides, "the expressing of any views, argument, or opinion, or the dissemination thereof... shall not constitute or be evidence of an unfair labor practice... if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The Supreme Court has held "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant*

Guard Workers of America, Local 114, 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966).

AB 1889 would prevent this free debate. AB 1889 defines "assist, promote or deter union organizing" to mean "any attempt by an employer to influence the decision of its employees" relating to labor organizations. Gov.Code § 16645(a). The parties do not dispute this definition includes attempts by the employer to influence employee decisions through speech. The parties also do not dispute AB 1889 prohibits such speech while the employer is being compensated with state funds or while the employer is on state property. AB 1889 is preempted because it regulates employer speech about union organizing under specified circumstances, even though Congress intended free debate.

Defendants and Intervenors argue *Machinists* is inapplicable here because the state is merely controlling the use of state funds, and is acting in a proprietary capacity as a "market participant." *See Boston Harbor, supra*, at 229, 113 S.Ct. 1190 (holding *Machinists* preemption apply only when the state acts as a regulator rather than as a "market participant with no interest in setting policy").

In *Boston Harbor*, the Supreme Court held the NLRA did not preempt enforcement by the Massachusetts Water Resources Authority, acting as owner of a construction project, of an otherwise lawful prehire collective-bargaining agreement negotiated by private parties. *Id.* at 232, 113 S.Ct. 1190. Unlike the challenged enforcement action in *Boston Harbor*, AB 1889 is not "specifically tailored to one particular job." *Id.*

AB 1889 is a regulatory statute similar to the Wisconsin statute debarring repeat offenders of the NLRA from doing business with the state, held to be preempted by the NLRA in *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 287, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). The Court rejected Wisconsin's contention the statutory scheme escapes preemption because "it is an exercise of the State's spending

power rather than its regulatory power," and focused instead on the "rigid and undiscriminating manner in which the statute operates." *Id.* In the Ninth Circuit, regulation for purposes of preemption law includes "traditional enactment of laws, ordinances, rules, and other legislative and administrative measures." *Alameda Newspapers, Inc. v. City of Oakland,* 95 F.3d 1406, 1413 (9 Cir.1996).[5] AB 1889 is a traditional legislative enactment, not a proprietary act.

It is true Congress has imposed similar restrictions as AB 1889 imposes. Intervenors cite three federal statutes restricting the use of particular federal program funds to "assist, promote, or deter union organizing."[6] *See* 29 U.S.C. § 2931(b)(7) ("Each recipient of funds under [the Workforce Investment Act] shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing."); 42 U.S.C. § 9839(e) ("Funds appropriated to carry out [the Head Start Programs Act] shall not be used to assist, promote, or deter union organizing."); 42 U.S.C. § 12634(b)(1) ("Assistance provided under [the National Community Service Act] shall not be used by program participants and program staff to assist, promote, or deter union organizing."). Such restrictions may show Congress approves of federal restrictions in those areas, but that is not inconsistent with the doctrine of preemption. If anything, it supports the view that Congress intended to

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[5] The recent D.C. Circuit decision cited by Defendants, *Building & Construction Trades Dept., AFL-CIO v. Allbaugh,* 295 F.3d 28, 35 (D.C.Cir.2002) (upholding Executive Order affecting specific contracts in federally-funded construction contracts, reasoning the government is acting in a proprietary capacity when it controls the use of its funds), is not controlling.

[6] The fourth statute cited by Intervenors, 29 U.S.C. § 1553(c)(1), was repealed in 1998. Pub.L. 105-220, Title I, § 199(b)(2), Aug. 7, 1998, 112 Stat. 1059.

regulate the field, and Congress, rather than the states, will impose the restrictions if they are to be imposed.[7]

III. DISPOSITION

Except for Gov.Code § 16645.1, 16645.3, 16645.4, and § 16645.6, Plaintiffs' motion for summary judgment that the remaining provisions of AB 1889 are preempted by the NLRA is GRANTED.[8]

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[7] The express Congressional approval of state provisions in *De Veau v. Braisted*, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960), is distinguishable from this case.

[8] AB 1889 contains a severability clause providing If any section or portion of this chapter. . .is held invalid . . . that invalidity shall not [a]ffect any other section. Gov.Code § 16649. The Court does not decide whether AB 1889 is preempted by the Labor Management Reporting and Disclosure Act or the Medicare and Medicaid Act, whether AB 1889 violates the federal Constitution, or whether declaratory or injunctive relief would be appropriate.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

No. 03-55169

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC

CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

and

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Intervenors-Appellants,

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Defendants-Appellants.

ORDER

Filed November 20, 2006.

Before SCHROEDER, Chief Judge, REINHARDT, BEEZER, KOZINSKI,. KLEINFELD, HAWKINS, THOMAS, SILVERMAN, McKEOWN, WARDLAW, FISHER, PAEZ, RAWLINSON, CLIFTON and CALLAHAN, Circuit Judges.

Plaintiffs-Appellees' motion to stay the mandate, filed October 6, 2006, is **GRANTED**, Fed. R. App. P. 41(b).

The mandate is stayed pending the filing of a petition for writ of certiorari in the Supreme Court. The stay expires ninety (90) days from the date of this order unless Plaintiffs-Appellees file a petition for the writ and so notify the Clerk

of this court in writing within the period of the stay. In that case, the stay shall continue until final disposition by the Supreme Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

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BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

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Plaintiffs-Appellees,

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BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants-Appellants.

Filed February 9, 2006

Before: SCHROEDER, Chief Judge.

ORDER

Upon the vote of a majority of the en banc court, the opinion and dissent filed on September 6, 2005, slip op. 12167, and appearing at 422 F.3d 974 (9th Cir. 2005), are withdrawn.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
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Defendants-Appellants.

Filed January 17, 2006

Before SHROEDER, Chief Judge.

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

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[1] Judge Berzon is recused.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

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Plaintiffs-Appellees,

and

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants-Appellants.

Filed May 13, 2005.

Before BEEZER and FISHER, Circuit Judges, and ENGLAND, District Judge.*

ORDER

The Petition for Panel Rehearing is GRANTED, and the case shall be resubmitted as of the date of this order, without additional oral argument. The panel's opinion is withdrawn and shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the panel upon rehearing.

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* The Honorable Morrison C. England, United States District Judge for the Eastern District of California, sitting by designation.

United States Constitution, Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

National Labor Relations Act, 29 U.S.C. § 158(c)

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

California Assembly Bill 1889, Cal. Gov't Code § 1645-1649

§ 16645. Definitions

For purposes of this chapter, the following terms have the following meanings:

(a) "Assist, promote, or deter union organizing" means any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following:

(1) Whether to support or oppose a labor organization that represents or seeks to represent those employees.

(2) Whether to become a member of any labor organization.

(b) "Employer" means any individual, corporation, unincorporated association, partnership, government agency or body, or other legal entity that employs more than one person in the state.

(c) "State contractor" means any employer that receives state funds for supplying goods or services pursuant to a written contract with the state or any of its agencies. "State contractor" includes an employer that receives state funds pursuant to a contract specified in paragraph (2) of subdivision (d). For purposes of this chapter, the contract shall be deemed to be a contract with a state agency.

(d)(1) "State funds" means any money drawn from the State Treasury or any special or trust fund of the state.

(2) "State funds" includes any money appropriated by the state and transferred to any public agency, including a special district, that is used by the public agency to fund, in whole or in part, a service contract in excess of two hundred fifty thousand dollars ($250,000).

(e) "State property" means any property or facility owned or leased by the state or any state agency.

§ 16645.1. Prohibition; requests for reimbursements; records; violations; penalties

(a) No state funds shall be used to reimburse a state contractor for any costs incurred to assist, promote, or deter union organizing.

(b) Every request for reimbursement from state funds by a state contractor shall include a certification that the contractor is not seeking reimbursement for costs incurred to assist, promote, or deter union organizing. A state contractor that incurs costs to assist, promote, or deter union organizing shall maintain records sufficient to show that no reimbursement from state funds has been sought for those costs. The state contractor shall provide those records to the Attorney General upon request.

(c) A state contractor is liable to the state for the amount of any funds obtained in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

(d) This section does not apply to a fixed-price contract or to any other arrangement by which the amount of the payment of state funds does not depend on the costs incurred by the state contractor.

§ 16645.2. Grant recipients; accounting for use of state funds; violations; penalties

(a) The recipient of a grant of state funds, including state funds disbursed as a grant by a public agency, shall not use the funds to assist, promote, or deter union organizing.

(b) For purposes of this section, each recipient of a grant of state funds shall account for those funds as follows:

(1) State funds designated by the grantor for use for a specific expenditure of the recipient shall be accounted for as allocated to that expenditure.

(2) State funds that are not designated as described in paragraph (1) shall be allocated on a pro rata basis to all expenditures by the recipient that support the program for which the grant is made.

(c) Prior to the disbursement of a grant of state funds, the recipient shall provide a certification to the state that none of the funds will be used to assist, promote, or deter union organizing. Any recipient that makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that state funds have not been used for those expenditures. The grant recipient shall provide those records to the Attorney General upon request.

(d) A grant recipient is liable to the state for the amount of any funds expended in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

§ 16645.3. State contractors; prohibitions; service contracts for state or state agencies; violations; penalties

(a) No state contractor shall assist, promote, or deter union organizing by employees who are performing work on a service contract, including a public works contract, for the state or a state agency.

(b) A state contractor that violates subdivision (a) is liable for a civil penalty of one thousand dollars ($1,000) per employee per violation.

§ 16645.4. State contractors in receipt of state funds in excess of a certain amount pursuant to contracts with state or state agencies; prohibition; records; violations; penalties

(a) A state contractor that receives state funds in excess of fifty thousand dollars ($50,000) pursuant to a contract with the state or a state agency shall not use those state funds to assist, promote, or deter union organizing during the life of the contract, including any extensions or renewals of the contract. The dollar threshold in this subdivision, however, does not limit the application of other provisions of this chapter that restrict the use of state funds.

(b) All contracts in excess of fifty thousand dollars ($50,000) and that are awarded by the state or a state agency shall contain the prohibition stated in subdivision (a).

(c) A state contractor who is subject to subdivision (a) and who makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that no state funds were used for those expenditures. The state contractor shall provide those records to the Attorney General upon request.

(d) A state contractor is liable to the state for the amount of any funds expended made in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

§ 16645.5. Employers conducting business on state property pursuant to contracts or concession agreements; meeting prohibitions; violations; penalties

(a) An employer conducting business on state property pursuant to a contract or concession agreement with the state or a state agency, or a subcontractor on such a contract or agreement, shall not use state property to hold a meeting with any employees or supervisors if the purpose of the meeting is to assist, promote, or deter union organizing. This section does not apply if the state property is equally available, without charge, to the general public for holding a meeting.

(b) An employer that violates subdivision (a) shall be liable to the state for a civil penalty equal to one thousand dollars ($1,000) per employee per meeting.

§ 16645.6. Public employers receiving state funds; prohibition; violations

(a) A public employer receiving state funds shall not use any of those funds to assist, promote, or deter union organizing.

(b) Any public official who knowingly authorizes the use of state funds in violation of subdivision (a) shall be liable to the state for the amount of those funds.

§ 16645.7. Private employers receiving state funds in excess of a certain amount; certification requirements; records; violations; penalties

(a) A private employer receiving state funds in excess of ten thousand dollars ($10,000) in any calendar year on account of its participation in a state program shall not use any of those funds to assist, promote, or deter union organizing.

(b) As a condition of participating in a state program pursuant to which it will receive state funds in excess of ten thousand dollars ($10,000) in any calendar year, a private employer shall provide a certification to the state that none of those funds will be used to assist, promote, or deter union organizing.

(c) A private employer who is subject to subdivision (a) and who makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that no state funds were used for those expenditures. The private employer shall provide those records to the Attorney General upon request.

(d) A private employer is liable to the state for any funds expended in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

§ 16645.8. Prosecution of civil actions; notice requirements; intervention; attorney's fees and costs

(a) A civil action for a violation of this chapter may be brought by the Attorney General, or by any state taxpayer, on behalf of the people of the State of California, for injunctive relief, damages, civil penalties, and other appropriate equitable relief. All damages and civil penalties collected pursuant to this chapter shall be paid to the State Treasury.

(b) Before filing an action under this section, a taxpayer shall give written notice to the Attorney General of the alleged violation and the intent to bring suit. If the Attorney General commences a civil action for the same alleged violation

within 60 days of receiving the notice, a separate action by the taxpayer shall be barred.

(c) A taxpayer may intervene as a plaintiff in any action brought under this section.

(d) A prevailing plaintiff in any action under this section is entitled to recover reasonable attorney's fees and costs. A prevailing taxpayer intervenor who makes a substantial contribution to an action under this section is entitled to recover reasonable attorney's fees and costs.

§ 16646. Treatment of expenditures; accounting for expenditures

(a) For purposes of this chapter, any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity.

(b) For purposes of accounting for expenditures, if state funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between state funds and other funds on a pro rata basis.

§ 16647. Exemptions

This chapter does not apply to an activity performed, or to an expense incurred, in connection with any of the following:

(a) Addressing a grievance or negotiating or administering a collective bargaining agreement.

(b) Allowing a labor organization or its representatives access to the employer's facilities or property.

(c) Performing an activity required by federal or state law or by a collective bargaining agreement.

(d) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.

§ 16648. Retroactive application

This chapter does not apply to an expenditure made prior to January 1, 2001, or to a grant or contract awarded prior to January 1, 2001, unless the grant or contract is modified, extended, or renewed after January 1, 2001. Nothing in this chapter requires employers to maintain records in any particular form.

§ 16649. Severability

The provisions of this chapter are severable. If any section or portion of this chapter, or any application thereof, is held invalid, in whole or in part, that invalidity shall not effect any other section, portion, or application that can be given effect.